CONSTITUTIONAL LAW OF ENGLAND

AN INTRODUCTORY MANUAL

BY

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PREFACE

The present work is the outcome of lectures delivered to law students during the last fourteen years. In their preparation the principal works on the subject have been freely used. The deepest debt is to Maitland, with whose writings I first came in contact in my college days. While preparing these pages for the press, I have received valuable suggestions from Mr. S. N. Haji, Barrister-at-Law, of Bombay and Rangoon, and from Dr. T. G. P. Spear of St. Stephen's College, Delhi. To both, I desire to express my gratitude. I also thank Mr. Harish Chandra Govel, B.A., LL.B. and Mr. Vidya Ratan Verma, B.A., both of Delhi, for the pains they have taken in checking the typescript and verifying the references.

M. S. SHAHANI.

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"Liberty adheres in some sensible object; and every nation has formed to itself some favourite point, which by way of eminence becomes the criterion of their happiness."

"All the ancient, honest, juridical principles and institutions of England are so many clogs to check and retard the headlong course of violence and oppression. They were invented for this one good purpose, that what was not just should not be convenient."

EDMUND BURKE.

CONSTITUTIONAL LAW OF ENGLAND

PART I

BASIC PRINCIPLES

CHAPTER I

CONSTITUTIONAL LAW

Nature of the Subject.—Constitutional law is the body of fundamental principles and practices in accordance with which a state is governed (*a*). It defines the structure of a political society, the form which its government must take, the relation between the state and the subject, and the relations of officials of the state between themselves and toward the subject or citizen. Nearly every modern nation has found it necessary to state, formally and explicitly, in writing, in the form of a code, how the community is to be organized, and in whom the powers of government shall vest. The principles underlying the constitution are considered so important, that the document is placed in a different category from other laws, so far as methods of amendment or repeal are concerned. Special safeguards protect it. Everywhere the point is emphasised that certain institutions are fundamental and must not be lightly altered or revised. In Great Britain however, the constitution is not to be found written in one single document. Nor is such a document in contemplation, much less within sight. Legally, the constitution may be revised with the same ease as any other law. But at least since the seventeenth century,

Constitutional law determines form and mode of government.

(*a*) Compare :

(1) "All rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state."
Dicey, *Law of the Constitution*, p. 22.

(2) "The fundamental law of a state, directing the principles upon which the government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise."
Bouvier, *Law Dictionary*.

(3) "A constitution properly so called is a frame of political society organized by and through law, that is to say, one in which law has established permanent institutions with recognized functions and definite rights."
Bryce, *History and Jurisprudence*, p. 137.

the constitution has stood for something which is set and definite, and which gives tone and colour to all institutions and laws.

Written and Unwritten.—A written constitution is usually embodied in a single document. It may be amended from time to time, yet it remains a single coherent code. But the way it actually functions is not wholly written down, and no constitution has ever yet been devised which has covered the entire sphere of constitutional law (*b*). For the most part such documents are brief, dealing as they do with fundamental principles. They need to be supplemented in important particulars concerning details of actual administration. As time goes on, customs and practices grow up.

Constitutional codes.

There is a strong belief that if basic laws are reduced to writing, doubts and misunderstandings are minimized, and vagaries of personal discretion eliminated. The aim is stability in administration—a check imposed upon quick and arbitrary changes. The language used is intended to be exact and lasting, and provides a test for official conduct in the future. The risk remains that standards of a by-gone age when a constitution was framed may impose themselves like a dead weight upon current activities of succeeding generations. Underlying the respect entertained for a constitution is the idea that it embodies fundamental law—a greater law than the rest. It is to keep the ruler in his place in the name of a law above his own. It is to safeguard important individual rights, such as the right to freedom of person, or the right to freedom of speech. It is set down in writing, and therefore must endure. Such hopes have inspired constitution-makers.

Aim at stability.

But, no constitution can, of itself, make official conduct conform to its laws. In the United States, for example, the Supreme Court construes the constitution. This process of construing is beset with dangers. Words

(*b*) Maistre (*Works*, p. 116) goes so far as to write: "The weakness and frailty of a constitution are in exact proportion to the number of constitutional provisions that are written."

may not mean the same thing to one generation as to another, and judges do not necessarily embody the law because they sit in the highest court. Their decisions are majority decisions, and the odd vote which decides, may or may not be inspired by insight into the true meaning of a phrase. Men invent formulæ. Time and circumstance frequently re-write them, and breathe into them a meaning their framers never intended. A constitution is devised as a protection against the dangers of succeeding ages. But it must also show vitality as a current institution; and this vitality exists only in proportion as a constitution has the power of adapting itself out of its constitutionality to meet the altered needs of the time.

But should adapt themselves to new times.

On the other hand, a constitution may be unwritten, that is, its principles may have never been formulated in one comprehensive code, but may have grown up gradually from precedent to precedent concerning rights of individuals or groups. Great Britain provides the most conspicuous example of such a constitution. Some precedents come to be recorded in law reports, and some even acquire statutory recognition. The constitution may be studied in text-books. But there is no single authoritative document in which it is embodied. It is found scattered in statutes, in judicial decisions, in customs, and in conventions. The King, the Houses of Parliament, the ministers, in fact, all organs of the state regulate their course of conduct chiefly according to usage.

Unwritten constitutions rest on usage.

There are great documents like the Magna Carta and the Bill of Rights at the centre of the political system. But since there is no written constitution, Parliament is, in theory, free to change the entire structure of English institutions. In practice, however, Parliament is a faithful mirror of public opinion. "Not a measure has been forced upon Parliament which the calm judgment of a later time has not since approved; not an agitation has failed which posterity has not condemned" (c).

(c) May, *Constitutional History*, Vol. II, p. 243.

Rigid and Flexible.—Again constitutions have been classed as rigid and flexible (*d*). It is believed that flexible constitutions can be, and are, changed with comparative ease, just as other laws are changed; that for altering rigid constitutions, a special, elaborate, and difficult procedure is required; and that therefore, it is only seldom that they are actually changed. These labels mislead. They point to a distinction which expresses only a part of the whole truth, and both labels may be claimed, in varying degrees, by every constitution. Nor is it the case that a written constitution is necessarily rigid, or an unwritten one necessarily flexible.

All constitutions partly rigid, partly flexible.

The English constitution is said to be of this latter kind. In legal theory, Parliament may alter it, wholesale and at one stroke. It may abolish the House of Lords, or put an end to cabinet government. However, as a matter of actual history, the constitution has changed but slowly through the centuries. In recent times, the suffrage has been extended on several occasions (*e*). The House of Lords has been definitely subordinated to the House of Commons (*f*). The self-governing Dominions have acquired a new status in the empire (*g*). But the broad features of the constitution no one can mistake. The truth of the matter is that an unwritten constitution may tend strongly to rigidity. It rests largely on custom, and custom declines as slowly as it grows.

England.

On the other hand, a written constitution may be a very pliable instrument. The Italian, Russian, and German constitutions, each embodied in a written document, have, in the last few years, been summarily bent, in complete subordination, to a particular party. The only sure test on this point is whether a constitution has changed often and easily. If it has, then alone is it truly flexible. It is curious, but true,

Italy, Russia and Germany.

(*d*) Bryce, *History and Jurisprudence*, Vol. I, pp. 151, 154.
(*e*) Representation of the People Acts, 1832, 1867, 1884, 1918, 1928.
(*f*) Parliament Act, 1911.
(*g*) Statute of Westminster, 1931.

that a difficult amending process has not made constitutions rigid. Nor has an easy one made them flexible.

Constitutions are supreme laws.

Conclusion.—Whether written or unwritten, whether rigid or flexible, constitutions must be regarded as supreme laws. They express the national character. In their turn, they mould the character of those who use them. The written laws and the unwritten customs under which the public life of a state goes on may be called its constitution. Like a nation, a constitution may have a character of its own. It may be difficult to define. It is more easily recognized. Those who work a constitution, and those who live under it come, in course of time, to acquire a sense of the appropriateness of things, of what is permissible and what is not permissible under it. This spirit which animates a constitution is the spirit which sustains it (*h*).

(*h*) Bryce, *History and Jurisprudence*, Vol. I, pp. 125-158.

Chapter II

GENERAL FEATURES OF ENGLISH CONSTITUTIONAL LAW

The Constitution.—In England the system of government is that of a limited monarchy. The head of the state is a hereditary monarch, originally possessed of wide legislative, executive and judicial powers. But their exercise has been progressively limited with the growth of parliamentary institutions, which are among the most characteristic products of the English spirit (*a*). They have gone round the whole globe, and become the model for various constitutions in different parts of the world. Accordingly, the British constitution has been described as the mother of constitutions, and the British Parliament as the mother of parliaments.

Limited monarchy.

Several countries have written constitutions, which guarantee what are called the "fundamental rights" of citizens, such as the right to personal freedom or the right to own property. In case of emergency, the executive may suspend them. In England, the constitution has not been written down in one document, and such rights have been established, for the most part, as a result of judicial decisions concerning individuals, and can be modified only by express legislative enactment. Again, in the United States, if an Act passed by Congress is at variance with the terms of the constitution, the Supreme Court may declare it unconstitutional, and therefore, void. In England there is no such power. When Parliament has passed an Act, it is fully valid, whatever its subject-matter, and whatever its consequences. No court can declare it unconstitutional. All courts must obey it.

(*a*) The famous Austrian legal philosopher, Ihering, writes: "In the guinea for which the litigious Englishman fights so stubbornly at law lies the explanation of England's constitutional history. No one, however mighty, will dare to rob of its dearest possession, liberty, a people in whose ingrained character it lies to battle boldly for its rights even in the smallest things."—Cited in Amos, *The English Constitution*, p. 33.

Among existing constitutions, the English constitution is one of the oldest in the world. But only a fraction of its basic character has been reduced to writing, and its institutions change continually under the pressure of social circumstances. Apart from Cromwell's short-lived Instrument of Government (*b*), there has been no attempt to reduce to an ordered series of paragraphs the mass of principles, rules, and established traditions, which make up the constitution. As a result, the machine of government shows remarkable elasticity, which has permitted great changes(*c*) to take place without upheaval. It is like a family mansion, in which additions and alterations are made from time to time, to suit the requirements and tastes of succeeding generations. Architectural symmetry is sacrificed, but solid comfort and security maintained(*d*).

Constitution changes under new circumstances.

Like a family mansion.

Since 1928 (*e*) there is universal suffrage in the land, and the qualifications for men and women voters are the same. The external signs of extreme democracy prevail. But in actual working practice, the traditional influence of the historic aristocracy remains.

The Form.—The various functions of government which originally vested in the King are now exercised by different hands. Parliament—consisting of the King, the House of Lords, and the House of Commons—deals with legislation and taxation. Executive authority is vested in the King, and is exercised through his ministers. Judicial power is centred in the House of

(*b*) This has no place in the continuous history of the constitution.

(*c*) Compare the Reform Act, 1832, which inaugurated the transition of power from the upper to the middle classes.

(*d*) "The British constitution was not evolved by a logician. It has grown to be what it is by the work of men like you and me, just ordinary men who have adapted the Government of the country to meet the environment of the age in which they lived. One reason why our people are floursihing and alive is, because we have never been guided by logic in anything we have done. Don't let us put our constitution in a strait waistcoat. If ever a saying was true politically it is that the letter killeth and the spirit giveth light."—*Per* Earl Baldwin, British Prime Minister, in a speech, May 1937.

(*e*) By the Representation of the People Act, 1928.

Lords. The legislature makes, the executive applies, and the judiciary interprets the laws. The supreme legislative *power rests with Parliament: it alone can pass, amend and repeal laws, and what Parliament has passed no court in the country can question.*

Doctrine of Separation of Powers.—According to the distinguished French jurist, Montesquieu (*f*), the direct object of the English constitution was the protection of personal liberty, and this was achieved by keeping separate and distinct the legislative, executive, and judicial authority. To his mind, a check is thereby maintained on each by the others, which prevents tyranny and makes for freedom. Montesquieu misread the English constitution on this point; and even if there was any justification for his view, it has disappeared since his time.

Separation of powers.

Such a division of powers as he speaks of its attractive in its simplicity, but has not found favour with men of affairs in England. In fact, it is likely to lead to inharmonious working. For instance, an interpretation given by courts may offend against the intentions of the legislature, and may not fit in with the plans of the executive. Or, the three component parts of Parliament—the King, the House of Lords, and the House of Commons—may not agree upon a particular measure of legislation. As a matter of fact, however, Parliament is the supreme legislative power, and can make any change in the law. If the executive disapproves of a judicial decision, it can move the legislature to modify the law on the point, because it is the executive which guides Parliament on almost every question.

Not favoured in England.

The second difficulty—disagreement about legislative measures—is met by what is called the cabinet system of government. The cabinet consists of a number of Privy Councillors. Normally, they are leading members of that political party which has a majority in the House of Commons, selected from both Houses of Parliament, and are in

Incompatible with cabinet government.

(*f*) *Espirit des Lois*, Book XI, Chapter 6, published in 1748.

charge of one or other department of state. They act as one body, and remain in office as long as they enjoy the confidence of the House of Commons. Failing that, they must resign, or advise the King to dissolve Parliament and order a general election. If they do not command a majority in the new House of Commons, they have no option but to resign. There must be agreement between the cabinet and the House of Commons, but agreement with the other House is not essential. The House of Lords, no doubt, may approve or disapprove of a measure of the government, or of the Commons. In the nineteenth century, an unwritten understanding prevailed, that if the nation expressed itself, strongly and in unmistakeable terms, in favour of the House of Commons, the Lords must give in. In 1911, came the Parliament Act. The broad effect of this measure is that the Lords have now no power in finance, and a mere suspensive veto (for two years) in other legislation.

Cabinet unifies the administration.

In point of fact, therefore, there is little division of the powers of government between distinct and separate persons and bodies. The cabinet system of government effectively prevents it. As Bagehot said, the cabinet is 'a combining committee—*a hypen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State' (*g*). To all appearances, government is in the hands of separate functionaries. Essentially it is unitary in character (*h*). Only in one respect is the doctrine of separation of powers recognized, namely, in the exceptional tenure given to judges who can be dismissed only on an address presented to the Crown by the two Houses of Parliament.

One exception.

The Sources.—Constitutional law in England is not contained in any particular written document, to which a special legal sanctity could be attributed, and which could for that reason be kept apart from other laws. It is only one part of the ordinary law of the land.

(*g*) *The English Constitution*, World's Classics edition, p. 12.
(*h*) Halsbury, *Laws of England*, Hailsham edition, Vol. 6, p. 389.

Naturally, therefore, it is composed of the same elements as other parts.

Common law.

The *common law* is largely the custom of the law. It is made up of an enormous mass of rules, not to be found in any statutes, but scattered over in some of the older text-books (*i*) and in the decisions of courts. From the thirteenth century onward, the decisions of the King's courts have made this customary law. By the sixteenth century certainly, decided cases came to be regarded as a definite authority which must be followed for the future. By far the largest element in the common law is this customary law, and constitutional law in England is only one part of the common law. Sir William Anson's (*j*) great treatise on the subject is appropriately called the Law and Custom of the Constitution.

Statute law.

Statute law consists of Acts passed by Parliament, but these Acts do not create the constitution. The Magna Carta, the Petition of Right, and the Habeas Corpus Acts are important landmarks in English constitutional history. But they do not lay down fresh law. They assume that the customary rules are there, already in existence, and simply amend them as new circumstances require. They are, so to say, additions and corrections in the book of the constitution. They would be unintelligible to any one who had not a certain familiarity with the book itself.

Conventions.

Conventions or understandings are present in every branch of the constitution, but are not to be found in other parts of the common law. They are invariably observed. But a breach of a convention is not a breach of law, and neither civil nor criminal proceedings can be taken for such a breach. If a convention is violated, the conduct is unconstitutional, no doubt, but not illegal. The relations of the Lords and the Commons, the relations of

(*i*) *e.g.*, Bracton's and Sir Edward Coke's, which are known as books of authority.

(*j*) Warden of All Souls College, Oxford, for several years. His treatise is the most authoritative exposition of the modern English constitution.

the King and the two Houses, the relations of the executive to the legislature, and, indeed, cabinet government itself rest on conventions; and, but for them, it would be impossible to work the constitution smoothly.

Conventions arose in the eighteenth century. The seventeenth century was marked by disputes between the King and the Houses of Parliament. The King claimed sovereign power in all matters and wanted the final say in all disputes. From early times, the King has enjoyed a special power, pre-eminence, or privilege over and above other persons, in virtue of his crown, known as the King's prerogative. The Revolution of 1688 transferred this power to Parliament. As before the prerogative belongs, no doubt, to the King, but, henceforth it is to be exercised by his ministers, and they must be in agreement with the House of Commons. The law remained the same. Its spirit and working were radically changed.

Royal prerogative now exercised by ministers.

Conventions exist in rigid constitutions as well. But the actual law being more precise, their sphere is naturally limited. The conventions of the English constitution have been enacted as sections in some constitutions which are directly based upon it. In England, in spite of its flexibility the constitution has not changed except very gradually, but this flexibility has allowed a variety of conventions to grow up, which play a large part in the working of the state.

Recapitulation.—The constitution is unwritten, and may be changed in the same way as any other law, such as the law relating to marriage or to motor vehicles. This is in sharp contrast with the constitutions of the United States, France, or Switzerland. There, the constitution is contained in a definite document, and that document contains the whole of the constitutional law. It stands separate from the ordinary law, and cannot be altered except by an elaborate and difficult procedure. But in actual practice, the English constitution is not more flexible than the constitution of the United States. The legal theory of the constitution and its actual working are divergent. In law, the King would

Constitutional theory and practice vary.

seem to have all the power of an absolute monarch. In fact, he must exercise it through his ministers in accordance with well-established rules. In theory, the King can veto legislation passed by the Houses of Parliament. Actually, this power has not been exercised for over two centuries, and may be regarded as obsolete (*k*). The constitution is simply part of the ordinary law. There is no distinction between a constitutional and an ordinary statute. Parliament may, at its pleasure, deal with either as it likes. It may legislate on any subject, and an Act passed by it is final. No court has power to declare it unconstitutional. The doctrine of the separation of legislative, executive and judicial powers is not recognized in England. Even the opposition party in Parliament is His Majesty's "loyal opposition." Can one blame Tocqueville for exclaiming "In England, the constitution . . . . there is no such thing"? (*l*).

The constitution is part of the ordinary law.

(*k*) Compare: "When we contemplate the theory of the British government, we see the King invested with the most absolute personal impunity; with a power of rejecting laws, which have been resolved upon by both Houses of Parliament; . . . . . What is this, a foreigner might ask, but a mere circuitous despotism? Yet, when we turn our attention from the legal existence to the actual exercise of royal authority in England, we see these formidable prerogatives dwindled into mere ceremonies.—Paley, *Moral Philosophy*, Book VI, Chapter vii.

(*l*) *Complete Works*, I. 166, 167.

CHAPTER III

PARLIAMENTARY SOVEREIGNTY

Parliamentary Sovereignty.—In his classic analysis of the English constitution, Dicey has laid the utmost stress on two features described by him as parliamentary sovereignty and the rule of law, the one protecting the citizen from arbitrary government, the other from arbitrary justice. By parliamentary sovereignty, he meant three things:—

Parliament is omnipotent.

1. Parliament has the right to make or unmake any law whatever.

2. No one has a right to override or set aside the legislation of Parliament.

3. This right or power of Parliament extends to every part of the king's dominions (*a*).

This legislative supremacy of Parliament he regards as the very keystone of the constitution. He quotes with approval a passage from Blackstone, who says: "It hath sovereign and uncontrollable authority in the making, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal . . . It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its powers, by a figure too bold, the omnipotence of Parliament" (*b*).

Crown's Challenge to Sovereignty.—This position has not been reached in English history without a struggle. Early in the seventeenth century, King James I issued a proclamation which forbade the erection of new buildings in London, and the making of starch from wheat. The House of Commons objected that this form of legislation was contrary to law. The King

(*a*) *Law of the constitution*, 8th. ed., pp. xviii, xix, and Chapter I.
(*b*) *Commentaries*, I, pp. 160, 161.

referred the question to Sir Edward Coke, and a conference between the Privy Council and the judges decided that *"the King cannot by his proclamation create any offence which was not an offence before"* (*c*). Later Kings claimed the dispensing power (*d*), that is, power to allow individuals to break the law, and the suspending power (*e*), that is, power to suspend the operation of any laws which displeased them. Both these powers were declared illegal in the Bill of Rights, 1689.

The King's proclamation is not law.

The Common's Challenge.—In the nineteenth century, the House of Commons attempted to lay down the law, by its own resolution, independently of the other House and the Crown. It authorized publication of a report by one of its servants. The report, undoubtedly, contained defamatory statements. When the publisher was sued, the House passed a resolution that the power of publishing its reports and proceedings was essential to the constitutional functions of Parliament, more especially to the Commons as the representative portion of it. The plaintiff contended that an order or resolution of the House cannot supersede or alter the established laws of the land, nor can it create a new privilege for the House, inconsistent with such laws. The publisher pleaded that the act complained of was done under the authority of the House of Commons, and in the legitimate exercise of its privileges; that the law courts are subordinate to the Houses of Parliament, and therefore not competent to decide questions of parliamentary privilege. It was further argued that even if the courts were competent to enquire into the existence of the privilege, it could be shown to have existed for a long time. Judgment was given in favour of the plaintiff. The court held: ".... *the House of Commons is not Parliament*, but only a co-ordinate and component part of Parliament. That sovereign power can make or unmake the laws; but *the concurrence*

Resolution of either House is not law.

(*c*) *The case of Proclamations* (1610), 12 Rep. 74.
(*d*) *Godden* v. *Hales* (1686), 2 Showers 475.
(*e*) *The Case of Seven Bishops* (1688), 12 St. Tr. 183.

of the three legislative estates (*f*) *is necessary; the resolution of any one of them cannot alter the law* or place any one of them beyond its control." It was further held that it had been the practice of the courts to enquire into questions of privilege, that a resolution of the Commons did not preclude the court from enquiring into the legality of the act complained of, and, lastly, that the right of publishing was not one of the privileges of the Houses of Parliament (*g*). So, this claim of the Commons to declare the nature and extent of its privileges, uncontrolled by the courts did not succeed. But under the Parliament Act, 1911, the Commons and the Crown together can legislate independently of the Lords, in certain circumstances.

Electorate's Challenge.—In the present century, it has been claimed that a member of the House of Commons is merely a trustee for the body or association which elected him, and therefore bound to vote in favour of measures which his electors supported. A trade union made rules for the levying of compulsory contributions from its members, in order to pay salaries or other allowances to members of Parliament. Those who received such payments, were pledged to support, in the House of Commons, the policy advocated by the trade union. One member of the union applied to the court for a declaration that the compulsory levies collected by the union were *ultra vires* and void. This application was granted. In the course of his judgment, Lord Shaw said: "Parliament is summoned by the sovereign to advise His Majesty freely. By the nature of the case it is implied that coercion, restraint, or a money payment, which is the price of voting at the bidding of others, destroys and imperils that function of freedom of advice which is fundamental in the very constitution of Parliament ..... Further, in regard to the member of

(*f*) The King, the Lords, and the Commons.
(*g*) *Stockdale* v. *Hansard* (1839), 9 A. & E. 1.
In consequence of these proceedings, the Parliamentary Papers Act, 1840, was passed, by which, publications made by authority of the Lords or the Commons became absolutely privileged, and, therefore, no legal proceedings can be filed in respect of them.

Members not bound to obey outside organizations.

Parliament himself, he, too, is to be free; *he is not the paid mandatory of any man or organization of men,* nor is he entitled to bind himself to subordinate his opinion on public questions to others, for wages, or at the peril of pecuniary loss; and *any contract of this character would not be recognized by a court of law,* either for its enforcement or for its breach" (*h*).

(*h*) *The Amalgamated Society of Railway Servants* v. *Osborne,* [1910] A.C. 87.

CHAPTER IV

THE EXERCISE OF SOVEREIGNTY

The Exercise of Sovereignty.—Since 1689, it has been more or less clearly settled that Parliament can make or unmake any law it likes. It can legislate on any question, even a question on which courts of law have already given judgment. It may declare illegal any convention however strong and however useful. It may even interfere with the rights of individuals. It may compel an owner of land to sell it to a railway company. A marriage may be solemnized without observing an essential formality. Such a marriage is invalid. But Parliament may pass an act to declare it valid (*a*).

Parliament may make any law.

Toward the close of the seventeenth century the maximum life of Parliament had been fixed at three years (*b*). In 1716, Parliament extended its own life by four years (*c*). The Parliament of 1911 restricted its life to five years (*d*), but, after war had broken out in 1914, prolonged it to a total of eight years. During this extension of its own life, it did some fundamental things. It passed a far-reaching Education Act, re-arranged the Government of India, and radically altered the franchise. The succession to the throne rests on an Act of Parliament (*e*). Parliament united England, Scotland

The Septennial Act.

(*a*) Dicey, *Conflict of Laws*, 5th edition, p. 758.
(*b*) Triennial Act, 1696.
(*c*) Septennial Act, 1716.
Dicey says :—"The Act proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state, and the Septennial Act is at once the result and the standing proof of such Parliamentary sovereignty"—*Law of the Constitution*, pp. 45-46.
(*d*) Parliament Act, 1911.
(*e*) The Act of Settlement, 1701.

and Ireland into a United Kingdom (*f*). It has given Southern Ireland dominion status (*g*), and thereby thrown off a part of its jurisdiction. Though, in strict legal theory, it is free to revise this arrangement, yet such a course will be opposed to all considerations of political expediency, which thus constitutes a *de facto* limitation of its supremacy. The Irish Free State, now known as Eire, is a Dominion, and there is an absolute convention (*h*) that there shall be no interference in the affairs of a Dominion against the wishes of its inhabitants. The franchise has been totally remodelled several times (*i*). In 1911, the Parliament Act definitely subordinated the House of Lords to the House of Commons (*j*). During the Great War, the King-in-Council enjoyed virtually dictatorial powers under the Defence of the Realm Acts (*k*). In 1920, Parliament passed a most sweeping Indemnity Act, which legalised thousands of technical illegalities committed by servants of the Crown during the period of war, and thus prevented legal proceedings being instituted in respect of them (*l*). It deprived the subject of trial by jury in many cases (*m*). When a financial crisis arose in 1931, and the Bank of England was unable to discharge its statutory obligation of paying out gold in exchange for paper currency, the cabinet authorized the bank to refuse to make payments in gold. For this, the cabinet had no lawful authority, but Parliament gave legality

Irish Free State.

Acts of Indemnity.

(*f*) Union with Scotland Act, 1706, and Union with Ireland Act, 1800.

(*g*) Irish Free State (Agreement) Act, 1922.

(*h*) This convention received statutory recognition in the Statute of Westminster, 1931.

(*i*) Representation of the People Act, 1832, 1867, 1884, 1918, 1928.

(*j*) "The surrender of the Lords is an example of one of the conditions that have made British constitutional development possible—that the possessor of a legal right shall not use it when it has become clear that it no longer corresponds to reality, and that if it is flourished it will be shattered"—Pickthorn, *Historical Principles of the Constitution*, pp. 28, 29.

(*k*) Of 1914-1915.

(*l*) Indemnity Act, 1920.

(*m*) Administration of Justice Act, 1920.

to the illegal action of the cabinet and of the bank (*n*).

Salaries reduced.

The same Parliament authorized government to reduce salaries of officials, even where this involved the breaking of contracts already made (*o*).

Parliament engages itself in large tasks, sometimes in small ones. When Queen Victoria's golden jubilee was to be celebrated, her son, the Duke of Connaught was Commander-in-Chief in Bombay Presidency. Under an old statute of 1793, if any commander-in-chief in India went home to Europe, he thereby resigned his office. To enable the Duke to attend the jubilee celebrations, Parliament passed a special Act by which he obtained leave of absence(*p*). "A statute about so trivial a matter,"

Large and small tasks.

says Maitland, "is a good illustration of the supremacy of Parliament. *If it can do the greatest things, it can do the least also;* if it can make general laws for a vast empire, it

But cannot prevent its own repeal.

can make a particular exception out of them in favour of a particular individual. *The one thing that it cannot do is to prevent its own repeal*" (*q*).

To this great authority of Parliament there is no rival or competitor. The King, the Lords, the Commons, the constituencies, and the law courts are all subordinate to it. All the parliamentary voters combined have not, in law, the power to initiate or repeal legislation. The law courts, while interpreting the common law or statute law, no doubt, do make new law. But this judicial legislation is carried on with the assent of Parliament, and is subject to its supervision. The resolution of neither House is law. Parliament is the supreme law-maker in the state.

(*n*) Gold Standard Amendment Act, 1931.
(*o*) National Economy Act, 1931
(*p*) Duke of Connaught Leave Act, 1887.
(*q*) *Constitutional History of England,* p. 387.

CHAPTER V

SOVEREIGNTY AND ITS LIMITATIONS

Alleged Limitations.—It has sometimes been said that legislation passed by Parliament is invalid if it is opposed to morality or to international law. But there is no legal basis for such a view. Every Act of Parliament is entitled to obedience by the courts, even if it should curtail the King's prerogative, or amend or repeal legislation passed by a preceding Parliament (*a*). "If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but *so long as it exists as law, the courts are bound to obey it*" (*b*).

Only one vital restriction exists: it is impossible to extend the maximum duration of Parliament beyond five years, by means of the special procedure of the Parliament Act, which does away with the necessity of the Lords' concurrence in legislation under certain circumstances (*c*). If a bill "purported to do so, the Crown could not legally assent, and even if assent were given, the measure would not bind the people or the Courts" (*d*).

Real Limitations.—Legal supremacy apart, there is no doubt that, from a political point of view, there are actual limitations upon the power of Parliament. There is always some fear that a measure may invite resistance. For this reason, Parliament would never dream of interfering in the affairs of the Dominions. "No Parliament would dare to disfranchise the Roman Catholics or prohibit the existence of trade

Political external limitations.

(*a*) See Dicey, pp. 61—85. Blackstone says · "Acts derogatory to the power of subsequent Parliaments bind not" 1st ed. p. 160.

(*b*) *Per* Willes J. in *Lee* v. *Bude and Torrington Junction Railway Co.* (1871), L.R. 6 C.P. at p. 582.

(*c*) See Parliament Act, (1911), s. 2 (*I*).

(*d*) Keith, *British Constitutional Law*, p. 127.

unions" (*e*). Then again, the very nature of the men who compose Parliament serves as an internal check upon the exercise of sovereignty. These men, living under a certain tradition, are not likely to indulge in extravagances and adventures. "People sometimes ask why the Pope does not introduce this or that reform? The true answer is that a revolutionist is not the kind of man who becomes a Pope, and that the man who becomes a Pope has no wish to be a revolutionist" (*f*). So, "if a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects idiotic before they could submit to it" (*g*).

Internal checks.

Working Practice.—In working practice, the dogma prevails that all legislation is the work of Parliament. Legislative forms are carefully preserved. But, for the most part, they are utilized by the cabinet. It is the cabinet which enjoys supreme political power. It decides what measures it wants, and then proceeds to obtain for them the seal of parliamentary approval. Sir Sidney Low, in the present century, has pointed out that the private member of Parliament may criticize, object, and suggest, but his influence over legislation is small indeed, smaller than that of a writer in the press (*h*). Long ago, Bagehot declared that "the legislature chosen in name to make laws, in fact finds its principal business in making and keeping an executive" (*i*). Only in the last resort, private members exercise their power of driving a cabinet out of office by an adverse vote on an important question.

Cabinet supreme.

(*e*) Laski, *Grammar of Politics*, p. 52.
(*f*) Dicey, *Law of the Constitution*, p. 78.
(*g*) Leslie Stephen, *Science of Ethics*, p. 143.
(*h*) *Governance of England*, pp. 60—75.
Professor Leacock, eminent both as humorist and as political scientist, says that the House of Commons is summoned "to give it an opportunity of hearing the latest legislation and allowing the members to indulge in cheers, sighs, groans, votes, and other expressions of vitality"—*My Discovery of England*, p. 62.
(*i*) *English Constitution*, World's Classics edition, p. 10.

In legal theory supreme, Parliament yet is confronted with several restrictions upon the exercise of its supremacy. Sovereignty rests on fiction, and fiction has invested Parliament with power beyond challenge. Facts detract something from it.

Sovereignty rests on fiction.

CHAPTER VI

THE RULE OF LAW

The Rule.—Writing in the year 1885, Dicey (*a*) said that the rule of law meant three things. *Firstly*, that no one could be made to suffer in body or goods "except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." Such a regime he contrasted with one in which persons in authority exercise "wide, arbitrary or discretionary powers of constraint". *Secondly*, that every man is "subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals". *Thirdly*, that the rights of individuals are secured by judicial decisions "determining the rights of private persons in particular cases brought before the courts." Briefly, in his opinion Englishmen are ruled by law and by law alone; that all are equal before the law, there being no *droit administratif* as in France, and lastly, that the constitution is the result of the ordinary law of the land. The rule of law means, essentially, that any restraint on human liberty must be in accordance with pre-established law, interpreted impartially by the courts. Power therefore rests with the legislator and the judge. The executive gets the least possible room for exercising any discretion. The rule of law may sometimes be harsh or even oppressive, as was the case when the laws applicable to dissenters were enforced. But under it, whatever happens is open and under the public eye, and powers given by the law for one purpose cannot be used for another.

Dicey's dictum.

Englishmen ruled by law alone.

The rule of law is a general principle of the English constitution. But its observance in all circumstances is clearly impossible. There cannot be a judicial review of traffic control. Judges themselves are

But this impossible on all occasions.

(*a*) *Law of the Constitution*, pp. 179—201.

frequently called upon to exercise a purely discretionary authority, as in matrimonial cases when the custody of children has to be given to one parent. Apart from such cases, the Home Secretary enjoys the right to open and detain letters. By his direction, persons suspected of murder are kept under repeated remand on a minor charge. The King's Lord Chamberlain censors plays, much to the annoyance of playwrights and stage-managers on occasion. His ban no court can remove (*b*). These powers clearly derogate from the rule of law.

1915.—Dicey himself, when he wrote the introduction to the eighth edition of his work in 1915, was compelled to say: "The ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline" (*c*). Though the rule has its roots deep in the English polity, yet the truth about it had been overstated by Dicey. There are important exceptions to it which call for attention.

Exceptions.—*Firstly*, the Crown enjoys striking immunities in litigation. In practice, they are enjoyed by state departments both against private citizens and state servants who may seek redress. There is complete immunity in case of a crime or a tort: the individual Crown servants alone are liable. The doctrine is that the King can do no wrong, and the King can only be made to answer to a superior for his actions, and not to his own courts. However, for a breach of contract or detention of property by the Crown, a special remedy exists—the Petition of Right (*d*). But even this remedy does not always avail. In the case of a soldier who filed such a petition for arrears of pay at the rate agreed upon when he enlisted, the petition was refused (*e*). During the Great War, there was a shortage of ships, and government

The King can do no wrong.

(*b*) E. Troup, *The Home Office*, p. 200.
(*c*) *Law of the Constitution*, p. xxxviii.
(*d*) Now regulated by the Petition of Right Act, 1860. The subject petitions the Home Secretary for leave to sue the Crown. The King, on his advice, either gives or withholds his fiat to bring the action. When the fiat is obtained, the action proceeds, as if it were an action between private citizens, and judgment may be given against the Crown. In such a case, the Crown always gives effect to the judgment, even though the other party may be powerless to enforce it.
(*e*) *Leaman* v. *The King*, [1920] 3 K.B. 663.

was anxious to get hold of as many for its use as possible. In 1918, a Swedish shipping company obtained a guarantee from the British Legation at Stockholm that in case a certain ship belonging to the company went to England, she would be allowed to return to Sweden and not be detained in England. This guarantee was given after consulting the proper authorities. The ship came, but after she had discharged her cargo, was not permitted to leave England. To avoid further loss, the company was compelled to sell the ship, and presented a petition claiming damages. This petition was refused. In giving judgment, Rowlatt, J., observed: ". . . . this was not a commercial contract . . . . . It was merely an expression of intention to act in a particular way in a certain event . . . . . it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. *It cannot by contract hamper its freedom of action in matters which concern the welfare of the State*" (*f*). This doctrine resembles the doctrine of state necessity (*g*). It has also been held that apart from some special statutory provision (*h*) any contract of service under the Crown may be terminated by the Crown without any notice (*i*). Even if there is an express term to the contrary in the contract, the Crown will not be bound by it. A Crown servant holds office only during the royal pleasure (*j*) Legally, there exists a rightlessness for the public servant against his employer, though it is not usual for the Crown to dismiss servants arbitrarily.

Petition of Right does not always help.

(*f*) The *Rederiaktiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500.

(*g*) The doctrine of state necessity does not find favour with English lawyers. "With respect to the argument of State necessity or a distinction which has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction." *Per* Lord Camden, C. J. in *Entick* v. *Carrington* (1765), 19 State Tr. 1029 at p. 1073.

(*h*) *e.g.* Supreme Court of Judicature Act, 1925.

(*i*) *Dunn* v. *R.*, [1896] 1 Q.B. 116 C.A.

(*j*) *Ibid.* *Denning* v. *Secretary of State for India in Council* (1920), 37 L.T.R. 138.

Secondly, the Home Secretary has an absolute discretion to grant to aliens certificates of naturalization as British subject. He can revoke such certificates at his pleasure (*k*). He has also power to deport any undesirable alien (*l*). The discretion that he enjoys is an executive discretion, not subject to control by a court of law (*m*).

Naturalization may be refused.

Thirdly, the Crown grants passports to enable British subjects to travel with safety in foreign countries. They are occasionally refused by the authorities concerned, in some cases, even where applicants are members of Parliament. No court interferes with this discretion (*n*).

Passports may be refused.

Fourthly, foreign states, their rulers and diplomatic agents enjoy considerable immunities in English courts of law. They are immune in case of their personal misconduct. Even against trading vessels belonging to foreign states, no legal process can issue (*o*). This latter immunity is a serious inroad upon the rule of law.

Foreign rulers' immunities.

Fifthly, a judge in vacation, who unlawfully refuses to issue a writ of *habeas corpus,* may be sued for a penalty of £500. But apart from this, judges enjoy very extensive immunity from civil and criminal proceedings for their acts, even when malice is alleged against them (*p*). This immunity is a matter of public policy, and is intended to insure for judges that absolute freedom and independence which is essential for the due administration of justice.

Judges' immunities.

Sixthly, a trade union cannot be sued in respect of any act committed by its officers or members in furtherance of a *bona fide* trade dispute (*q*).

Trade unions.

(*k*) British Nationality and Status of Aliens Act, 1914—18.
(*l*) Aliens' Acts, 1914, 1919.
(*m*) *Ex parte Venicoff,* [1920] 3 K.B. 72.
(*n*) See Robson, *Justice and Administrative Law,* p. 87.
(*o*) *The Parliament Belge* (1880), 5 P.D. 197; *The Porte Alexandre,* [1920] p. 30.
(*p*) *Royal Aquarium Co.* v. *Parkinson,* [1892] 1 Q.B. at p. 451.
(*q*) Trade Disputes Act, 1906.

Crown's advantages in procedure.

Lastly, if a subject of the Crown sues a public authority, he must do so within six months of the injury inflicted. Besides this, the official must be given an opportunity of tendering amends. If the suit does not succeed, the official can claim costs on a higher scale than the ordinary defendant can (*r*). It is obvious that the limitation of time may work serious hardship in some cases (*s*).

The above examples will suffice to show that privileged persons and bodies exist; to them, the laws applicable to subjects in general do not apply; and they enjoy powers which no court can control.

(*r*) Public Authorities Protection Act, 1893.
(*s*) *Freeborn* v. *Leeming,* [1926] 1 K.B. 160.

CHAPTER VII

ADMINISTRATIVE LAW

Parliament delegates rule-making power.

Administrative Activities.—Since 1885, when Dicey first wrote about the rule of law, it has become increasingly clear that Parliament delegates to government departments and other bodies large powers to make rules and orders of a legislative character. These include orders made by the King-in-Council, rules and orders made by ministers, provisional orders, and bye-laws and regulations of local authorities. Parliament has, no doubt, power to revoke or vary the delegated authority, and, as a matter of theory, certain arrangements exist for supervision over this kind of legislation. But in actual practice, they remain a mere formality. No doubt, if a rule or order made by an administrative body is inconsistent with the Act authorising the rule or order, the courts may declare it *ultra vires*. But the protection which this remedy provides is of no avail when a delegating Act says that "general rules may be made under this section and shall be of the same effect as if they were contained in this Act, and shall be judicially noticed" (*a*). The Rating and Valuation Act, 1925, allows a minister "to do any other thing which appears to him necessary or expedient . . . . for bringing the said provisions into operation, and any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient for carrying the order into effect" (*b*). Judicial review of administrative discretion has suffered a marked decline. In 1915, Dicey himself showed a faint recognition of this process. It is remarkable that writing in 1887, Maitland said: "Year by year the subordinate Government of England is becoming more and more important. The

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(*a*) See *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347.
(*b*) See s. 7.

new movement set in with the Reform Bill of 1832: it has gone far already and assuredly will go further. We are becoming a much governed nation, governed by all manner of councils and boards and officers central and local, high and low, exercising the powers which have been committed to them by modern statutes" (*c*).

England a much-governed country now.

The tendency today is to rely upon government bureaus rather than upon law courts, and in spite of vigorous protests from some lawyers (*d*) during recent years, it shows no sign of abatement. It is probably inevitable under modern conditions of life. More and more there is a demand for speedy decisions, a demand that directions should precede action, so that one may not have to act and then guess how his affairs will be regarded by the judges. Parliament is hard pressed for time. It is not always in session. Nor is it possible, at the time of introducing legislation to foresee all the conditions that may arise out of a proposed measure. Administrative authorities can vary their rules and regulations to meet new situations with an ease and elasticity, which is not to be expected in the parliamentary method. Subordinate legislation has therefore become a feature of today. The statute book is proverbially ponderous, but it is slender as compared with the mass of rules and orders which government departments issue under the authority of Acts of Parliament. The Road Traffic Act, 1930, comprises 123 sections which cover 114 pages of print. As many as 22 different sections give authority to the Minister of Transport to make regulations for carrying out the provisions of the Act or for amending them. The new practice for Parliament is to state the principles and to leave it to administrative bodies to fill in the details. This is a fundamental change in constitutional method, which can no longer be ignored. Only, an adequate theory must be developed by means of which the new machinery can be controlled.

This inevitable.

Subordinate legislation growing fast.

(*c*) Maitland, *Constitutional History of England*, p. 501.
(*d*) See Lord Hewart, *The New Despotism*.

Extra-judicial Decisions.—We may note three distinct forms of decisions arrived at outside the law courts. *Firstly,* some Acts confer power on officials to hear complaints, reserving a right of appeal to the ordinary courts. Such an Act is the Income Tax Act, 1918, which gives this authority to the Income Tax Commissioners. *Secondly,* certain Acts have set up an elaborate organization of civil servants for the hearing of claims, appeals, and final appeals. The Unemployment Act, 1920, is such an Act. An 'insurance officer' decides all questions of unemployment benefit. The claimant may appeal against his decision to a 'court of referees'. In the last resort, appeal may be made to an 'umpire' whose decision is final and conclusive. *Thirdly,* certain Acts provide for an appeal to a government department against the decision of local authorities or civil servants. The Road Traffic Act, 1930, is such a statute. It set up a 'traffic commissioner' who deals with all applications for a 'public service vehicle license'. Applicants may appeal against his decision to the Minister of Transport who can make 'such order as he thinks fit'. No further appeal or review is possible.

Three forms.

The Arlidge Case.—This system of extra-judicial decisions may be seen working in the well-known case of *The Local Government Board* v. *Arlidge* (*e*). Under the Housing Act of 1909, a local authority may prohibit the use of any dwelling house which appears unfit for human habitation. The owner may appeal against such an order to the Local Government Board. The Board must hold a public local enquiry, and it may be called upon to state a special case for the opinion of the High Court on a point of law. Apart from these requirements, the Board is free to lay down its own procedure and to pass such orders as it thinks equitable. Under the Act, any order of the Board which complies with these requirements is 'binding and conclusive on all parties.' The Board dismissed an appeal of Arlidge against a demolition order in

The House of Lords upheld departmental procedure.

(*e*) [1915] A.C. 120.

respect of his house. A public enquiry had been made, at which Arlidge was represented. He was invited to state his case in writing, but was not permitted to attend in person. He did not demand that the Board should state a special case on a point of law. Instead, he appealed to the High Court to quash the order of the Board. He complained that the order did not disclose the name of the officer of the Board who had decided the appeal, that he was denied an oral hearing, and was not allowed to see the report of the Inspector who held the public enquiry. The House of Lords dismissed the appeal. Under the Act, the order of the Board was 'binding and conclusive'. Therefore, no court could interfere with it. The House of Lords declined to admit the injustice of departmental procedure, and only insisted that the arguments of both sides must be considered, and the enquiry and the decision must be made in a judicial spirit. Nor need any reasons be adduced as in a judgment of a law court.

Merits and Demerits.—The great increase of subordinate legislation and of the delegation of judicial powers to administrative agencies point to a new view of the functions of government. Government is no longer merely a means of securing order, independence, and the enforcement of individual rights. Among its prime functions is public service. The legislation which has conferred judicial powers on government departments relates, among other things, to public health, to housing and town planning, to national health insurance, to unemployment insurance, to old age pensions, and to road traffic control. Most of the cases which come before civil servants raise questions of administration rather than of law. They require a cheaper and quicker mode of decision than the courts provide. The technical knowledge of administrative officials is highly useful in the discharge of judicial functions in special fields, where mere intelligence and general education will hardly suffice.

New view of government functions.

In a law court the subject has confidence in the independence of judges. He values a public trial of the points at issue. Every party is free to present his case. Every one knows which individual judge is deciding the case, and therefore a personal responsibility rests upon him for the judgment he pronounces. The court decides according to legal rules, and these operate uniformly. The methods of government departments are different. But there is no serious objection if a case is stated in writing and oral hearing is refused, or is considered in the privacy of an office room and not in open court. Nor need any hardship result because a decision is arrived at on the responsibility of a whole department instead of an individual officer. But the fact that judicial intervention has been pushed out in so many cases has caused alarm in certain quarters (*f*). A kind of administrative law has been growing up in England. It is yet in its infancy. On the whole, it seems that decisions should give reasons, and they should be published, so that the outside world may know the lines on which civil servants are developing departmental law. Also, if a member of an administrative tribunal can be proved to be guilty of malice, negligence, corruption or fraud, it might be an advantage to make him legally liable.

Value of public trial.

Departmental methods.

(*f*) See Lord Hewart, *The New Despotism.*

CHAPTER VIII

THE RULE OF LAW AND ADMINISTRATIVE LAW

Droit Administratif.—When Dicey referred to equality before the law he meant that in England an official is subject to the same rules as an ordinary citizen. This arrangement he contrasted with the *droit administratif* (*a*) of France. There, according to him, official courts have been established, where officials are tried before an official bench for acts done in an official capacity. There is, inevitably, a fellow-feeling among officials, and the ends of justice are at times, perverted. Consequently, the ordinary individual frequently endeavours to get his case tried in an ordinary court. The *"Tribunal des Conflicts"* decides whether a particular case should go before an official court or an ordinary court. One might be led to believe that in France, considerations of administrative expediency take the place of law, and provide a shield to protect administrative authorities from the consequences of their acts by means of tribunals, more administrative than judicial in character and whose decisions rest upon "special rules, privileges and prerogatives" which favour officials at the expense of "the private citizen" (*a*).

Dicey on *droit administratif.*

Its True Character.—It is now generally recognized that Dicey misconceived the true nature of *droit administratif.* "It consists", says Monsieur Achille Mestre, "of all the legal rules governing the relation of public administrative bodies to one another or to individuals. In France . . . . . our starting-point is the dual nature of rights emphasized so strongly by the Roman jurists, and we recognize that public interests are not, as such, regulated by the legal system dealing with private matters" (*b*). Professor J. H. Morgan points out

(*a*) *Law of the Constitution*, Ch. XII.
(*b*) *Cambridge Law Journal*, 1929, pp. 356-57.

that it is a mistake to imagine that in countries with a system of administrative law, public officials are chartered libertines. "What administrative law does in France, and still more in Germany, is not to exempt public officials from responsibility where in this country (England) they would be liable but to extend that liability to cases where in this country they would be immune" (c). In Germany, "its object is the protection of the individual against the intermeddlings (*Eingrieffe*) of the administration" (d).

Really a check on public servants.

The English and French Systems.—Attention has already been drawn to the immunities which apply in England to the King, foreign sovereigns, judges, government officials, and trade unions. Special rights and duties attach to infants, lunatics, married women, drivers of motor cars, pawn-brokers, money-lenders, landlords, and several other classes of persons. But what Dicey emphasized most is that if a public officer commits a tort he can be sued for it in an ordinary civil court. Subject to qualifications, this is true. But on this point, *droit administratif* does not afford an effective contrast. That system of law does not exclude officials from liability. Its object is to determine their powers and duties and to prevent abuses of their functions. Altogether, the weight of expert opinion is in favour of the continental system. Under it the public interest is paramount. Individual rights are secured by an adequate trial before a competent tribunal. It provides a method of redress open, free of charge, to all who consider themselves aggrieved by any act of a public authority. More and more, the necessity and importance of administrative courts as a part of modern governmental machinery is being recognized. In England, the whole trend of legislation for over fifty years has been toward the creation of an administrative law, and "there now exists a *droit administratif* of a type far inferior to the French

Affords easy redress.

English system inferior to French system.

(c) J. H. Morgan, Introduction, Lxi in Robinson, *Public Authorities and Legal Liability*.
(d) G. Meyer, *Lehrbuch des Deutschen Verwaltungrechtes*, p. 46.

where jurisprudence has evolved a most carefully worked out system for protection of the public from misuse of official power" (*e*). The problem is to have a system, at once coherent and workable. "The introduction", says Mr. C. K. Allen, "of a rational and scientific system of administrative law is the greatest need in the whole English legal system of today" (*f*).

The Result of the Ordinary Law.—The constitution, says Dicey, is the result of the ordinary law of the land. What are called fundamental rights in other constitutions (for example, the right to personal liberty, or the right of public meeting) do not exist as such in England. The constitution is not written and there is no general grant of freedom of either of these two kinds, but a high degree of each is secured to the public by the protection which the private citizen receives from the courts, against other subjects and against the Crown. He may go where he likes and say what he likes, so long as he does not thereby violate any provision of law.

Fundamental rights are out of place in England. The foremost plank in the constitution is the supremacy of Parliament, and this supremacy cannot exist side by side with fundamental rights. Laws spring directly from it or grow up by its leave. If the constitution is regarded as the result of the law of the land, it may equally well be maintained that the laws of the land result from the constitution, which, for the most part, means the

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(*e*) A. B. Keith, *British Constitutional Law,* p. 92.

Says Monsieur Achille Mestre : "And yet when a traveller has stayed a short time in Great Britain, has talked with the recognized authorities of that country, has asked questions, has made notes, has dipped into the recent works on English law, has glanced with an unprejudiced eye at the whole trend of legal institutions at the present day, he cannot help being struck by a certain lack of harmony between the official doctrine, which for such a long time has had good reason to say that there is no administrative law in England, and the judicial practice which, owing to the creation of new jurisdictions, to the introduction of new forms of procedure, and to the needs originating in the obvious inadequacy of inherited views, seems to have the way for the introduction into England of a *droit administratif* and the recognition of principles derogatory to the common law—principles which are adapted to playing in English law the part which *droit administratif* played in the French common law during the nineteenth century, and still plays." *Cambridge Law Journal*, 1929, pp. 355-356.

(*f*) *Law in the Making,* p. 348.

supremacy of Parliament. But it serves no useful purpose to distinguish law and constitution in this way.

Conclusion.—In conclusion, it may be said that the rule of law is a basic principle of the English constitution. Like the doctrine of parliamentary supremacy, it has been subject to several exceptions. The *droit administratif* of France, with which it has been contrasted is in truth no engine of arbitrary government, but a means of securing to the citizen full redress of his grievances against officials. In England, government departments issue rules and regulations under the authority of Acts of Parliament, and the volume of this delegated legislation is increasing very rapidly. Several Acts have authorized government departments to make enquiries, hear complaints and to pass final orders, against which courts of law cannot hear any appeals. Administrative law, therefore, now exists in England, though in a rudimentary form. Well-informed opinion in England feels the need for a systematic body of such law. The exceptions noted above and the activities of administrative departments derogate from the rule of law as understood by Dicey. However, it is possible to view the matter differently. There is no opposition between administrative and legal justice, because all lawful authority within the state is legal authority. The real contrast is between *judicial justice* and *administrative justice*. Ordinary courts administer rules of law. So do administrative departments. Both also exercise discretion in applying the law to individual cases. The rule of law can exist under both systems of judicature—the administrative no less than the judicial. "There is no warrant for the view that the latter (administrative justice) stands outside the realm of law or that it constitutes a limitation upon its rule" (*g*). Dicey's dictum about the rule of law remains true, but its meaning today is different from the meaning it bore in the mind of its illustrious exponent.

Administrative justice is not judicial justice, but it is legal justice.

The meaning of rule of law has changed.

(*g*) Lauterpacht, *The Function of Law in the International Community*, p. 387.

PART II

PARLIAMENT

CHAPTER I

HISTORICAL SKETCH

Early Beginnings.—To start with, Parliament was a consultation of the mediæval King with his tenants-in-chief for administrative and judicial purposes. Members were not representatives of any groups or interests, and regarded their duties as a burden rather than a privilege. In the thirteenth century, Edward I summoned the Model Parliament consisting of archbishops, abbots, earls, barons and commons. This marks the rise of the modern Parliament, organized, in part at least, upon a representative basis and not insensitive to the movements of trade and industry. By the end of the Middle Ages, the House of Lords began to take shape, and peers began to be distinguished from the King's Council. By the time of Edward III, a separate House of Commons grew up which sat apart to consider informally the business which they had to discuss as a part of Parliament. By the end of the fourteenth century, the Commons secured the initiative in finance, but legislation remained in the hands of the Crown. By the end of the fifteenth century, all legislation was passed "with the advice and consent of the Lords Spiritual and Temporal and Commons." Yet as a matter of fact, the King decided upon the legislation that he wanted, and only called upon Parliament to formally register its approval.

The Model Parliament.

Finance.

Legislation.

By the sixteenth century, the outlines of Parliament became somewhat more distinct. The House of Commons was mentioned in despatches. Its proceedings were recorded in a journal. All members had equal rights. Votes were taken at the end of a debate. Seats in the House came to be regarded as valuable, and this led to bribery and election promises. Members of the King's

16th century.

Council and sons of peers became members of the Commons. The Tudor Sovereigns were intensely jealous of their royal prerogative. But they had to deal with a hostile peerage. They were shrewd enough to use the Commons as an instrument of the royal will. The laws drafted by their judges were confirmed by Parliament, and the Tudors succeeded in keeping in obscurity any challenge to their authority.

17th Century and After.—The constitutional struggles of the seventeenth century definitely settled that sovereignty should rest not with the King but with the King-in-Parliament. A severe check was thus imposed upon the authority of the King and of the King-in-Council. Power came into the hands of the landed aristocracy, who maintained their hold upon the House of Commons throughout the eighteenth century, by a variety of devices. The Reform Act of 1832 broke the spell of the fear of change, and a steady extension of the franchise followed for a hundred years. But in spite of this, the House of Commons remained predominantly aristocratic in character throughout the nineteenth century. It was the social centre of London, and sons of peers kept themselves occupied with politics in the Commons. Elections were expensive, and social influence counted for much. Bribery at elections was not effectively restrained until late in the nineteenth century.

Sovereignty passes to Parliament.

Then and Now.—'Parliament' which originally signified a discussion only gradually came to mean a discussion of a particular kind, namely, that which the King had with the estates of the realm. Then in course of time, it has come to mean the body of persons engaged in the discussion. This is Parliament in the modern sense. It emerged from the meeting of the King's Council with barons, clergy and representatives of the counties and boroughs. Those who were not peers or elected representatives were, by gradual steps, eliminated from it. Some traces of the old order of things still remain. To this day Privy Councillors can be present at sittings of the Lords,

Modern idea of Parliament.

though they may not vote. Judges and law officers receive a formal summons to come and assist the Lords, but this summons is now not obeyed (*a*). The King's assent to Bills is given in the Lords. Its Clerk is Clerk of the Parliaments. A peer withdraws when the Commons clear the house of strangers. These practices point the finger to early times when the Commons were not an integral part of the conclave of the King and his advisers. They are a later growth round the original nucleus.

Parliament and Government.—Three things occupy the attention of Parliament—finance, legislation and criticism of the administration. For centuries, the House of Commons fought to secure for itself a position of pre-eminence in controlling the affairs of the country. Today the ministers of the Crown and the Commons are no longer two independent bodies, each pulling its own way. When a general election takes place, the party leaders aim at the election of a House of Commons which will support a government of a particular party or combination of parties. So long as that party or combination of parties is in a majority, the government can generally demand support from the House of Commons, without fear of refusal. The fact is that the government of the day has the power of life and death over Parliament, since the King will only dissolve Parliament at the request of the Prime Minister. In order to avoid the expenses of a new election, a majority of Parliament is always engaged in encouraging a government to stay in power. There is therefore no point in speaking of government as being responsible to the House. Ministers observe most carefully the parliamentary forms of persuasion, but the verdict of the House is seldom in doubt. "There has not been a single instance in the last twenty-five years when the House of Commons by its own direct action has reduced on

Ministers control Parliament.

(*a*) "A judge is still addressed as 'my lord' because the high court of justice in which he sits is . . . . an historical part of the high court of Parliament, of which the judges are lords"—Pollard, *Evolution of Parliament*, p. 24.

financial grounds any Estimates submitted to it" (*b*). Periodically, the electorate gets an opportunity of saying whether it will re-elect a House of Commons to support the Government of the day or not.

(*b*) Report of Parliamentary Committee (1928), quoted by Mr. Ramsay Muir in *How Britain is Governed*, p. 227.

CHAPTER II

COMPOSITION OF THE LORDS

Members.—The House of Lords is the oldest second chamber in the world, unless an exception be made for Hungary. It is the most numerous, and in character the most hereditary. It consists of about 750 members, largely hereditary peers of the United Kingdom, but there are other elements as well. The princes of the blood royal sit in their capacity of dukes, though they take no part in debate. The non-hereditary elements consist of two archbishops, twenty-four bishops, sixteen representative peers elected by the Scottish peers for each Parliament (*a*), the remains of the declining Irish peerage (*b*), and seven Lords of Appeal in Ordinary, who sit and vote for life and form the nucleus of the House of Lords in its judicial capacity.

Mostly hereditary.

Other elements.

Incidents of Membership.—It is obvious that the composition of the Lords is largely determined by the Crown. The King is the fountain of honour. He may ennoble any one he likes. He has an exclusive right to decide whom he is going to call to the House as his advisers. This prerogative is controlled more by expediency than by law. Even if a Scottish or Irish peer is not entitled to a seat in the House of Lords, the King may create him a peer of the United Kingdom and thus entitle him to a seat. But the Crown cannot limit the extent of a peerage when once it has been granted. When the King has created a peer and issued to him a writ of summons to Parliament, the peer, and after him his heir, has a right to a seat in the

The King creates peers.

(*a*) Act of Union, 1707.

(*b*) Originally elected for life. This system was abolished on the creation of the Irish Free State in 1921.

Lords (*c*). The Crown may create a peerage for life, but such a peerage confers no title to a seat in the House (*d*). Again, it has been held that the Crown cannot limit the descent of a peerage in any way unknown to the land law of the country (*e*). Peerage is a gift from the Sovereign, but having conferred it the Crown cannot alter the incidental rights which belong to the peer. When a peer has received a writ of summons to Parliament and has actually sat in any Parliament, he has thereby acquired a hereditary right to the writ. The right continues for ever. The Crown may not extinguish it. It can come to an end only if there is no heir of the peer at all or if an Act of Attainder is passed (*f*). The peerage is said to ennoble a man's blood. Once ennobled, it remains so for ever. No peer of the realm can drown or extinguish his honour. He cannot resign or relinquish it. The heir to a peerage must accept it, whatever may be his inclination. He may not transfer the peerage. He may not surrender it. Nor may the Crown re-grant it to another (*g*). Peers who are entitled to a seat in the House of Lords are entitled to a writ of summons. During the Great War, some members of the House of Lords were fighting in the German army. It became necessary to pass an Act of Parliament to take away the right to a writ in the case of such Lords (*h*).

But he cannot alter their incidental rights.

Peers cannot give up the peerage.

The Crown alone can grant to a peer the right to summons. It can never be given at the will of private persons. Nor can it be derived from the holding of any land (*i*). An alien and a bankrupt are disqualified from

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(*c*) *Barony of Clifton case* (1673), Collin's Baronies 291.
(*d*) *The Wensleydale Peerage case* (1856), 5 H.L.C. 958.
(*e*) *Buckhurst Peerage case* (1876), 2 A.C. 1.
(*f*) An Act of Attainder is an Act of Parliament, in form legislative, in substance judicial, by which a man could be convicted and sentenced without any judicial formalities. It passes through all the stages of a regular Bill, and receives the royal assent. This method of proceeding against a person was used when no real charge could be substantiated. The last case of attainder was in 1696.
(*g*) *The Barony of Grey of Ruthyn* (1640), Collins' Baronies 195.
(*h*) Titles Deprivation Act, 1917.
(*i*) *The Berkley Peerage case* (1861), 8 H.L.C. 21.

receiving a writ. An infant may not sit in the House of Lords. Peerages may descend to women, but they enjoy no right of summons (*j*), in spite of recent legislation which aims at removing disqualifications due to sex (*k*). A member sentenced to penal servitude or imprisonment with hard labour for twelve months cannot sit or vote, unless pardon has been granted or the term of punishment has expired.

Women cannot sit in the House.

(*j*) *Viscountess Rhonddas' Claim*, [1922] 2 A.C. 339.
(*k*) Sex Disqualification Removal Act, 1919.

CHAPTER III

COMPOSITION OF THE COMMONS

The Commons.—The House of Commons consists of 615 members, seventy-four represent Scottish constituencies, thirteen Northern Ireland, and the rest England and Wales. For the most part constituencies are single-member constituencies and consist of approximately the same number of electors. Members are elected by a majority vote. Proportional representation exists only in the university constituencies. Since 1929 (*a*), males and females of 21 years or more can vote. They must be British subjects who have resided in a constituency for three months, or occupied business premises whose annual rental value is at least £10, or who are graduates of a university (*b*). The husband or wife of an occupier of business premises of the annual value of £10 may also vote.

Voters' Register.—A vote cannot be exercised unless the elector's name is placed upon the register of electors, which is prepared once every year in each parliamentary borough and county. Once a person is placed on the register of electors, he is entitled to vote, unless he suffers from a legal incapacity such as infancy or insanity. If a returning officer maliciously refuses to accept his vote at an election he thereby infringes a right of property and may be sued for damages (*c*). Infants, idiots, lunatics, peers (except peers of Ireland who are elected members of the House of Commons for British constituencies) cannot exercise the franchise. So also aliens, returning officers, persons under sentence for treason or felony and persons convicted of corrupt and illegal practices.

(*a*) See Representation of the People Acts, 1918 and 1928.
(*b*) The last clause applies only to university seats.
(*c*) *Ashby* v. *White* (1704), 2 Ld. Ray 938.

Disqualifications for Election.—The following persons cannot be elected:—

(*a*) *Aliens.* But if an alien becomes naturalized as a British subject, this disqualification comes to an end.

(*b*) *Minors.* But cases were frequent in the eighteenth century and the early part of the nineteenth where minority was connived at.

(*c*) *Lunatics.* A member vacates his seat if the lunacy commissioners report him to be a lunatic after two examinations which must be held at an interval of six months (*d*).

(*d*) *Persons convicted of treason or felony.* Such persons cannot sit if the sentence awarded is more than twelve months' imprisonment or is accompanied by hard labour. On completion of the term of punishment, this disability is removed (*e*).

(*e*) *Bankrupts.* The disqualification continues for five years after a bankrupts' discharge, except in cases where the bankruptcy was not caused by misconduct (*f*).

(*f*) *Parliamentary candidates convicted of corrupt practices.* Such persons cannot seek election from the constituency in question at any subsequent election. At other constituencies they are disqualified for seven years (*g*).

(*g*) *Clergy* of the Church of England, Church of Scotland, and the Roman Catholic Church. But clergy of the Church in Wales and nonconformist clergy in England may sit.

(*h*) *Peers.* But Irish peers who are not elected members of the House of Lords are eligible. The eldest sons of peers of the United Kingdom have courtesy titles. But they may sit in the House of Commons.

(*d*) Lunacy Act, 1890.
(*e*) Forfeiture Act, 1870.
(*f*) Bankruptcy Act, 1890.
(*g*) Corrupt Practices Act, 1883.

(*i*) *Contractors with government.* The penalty is £500 for everyday on which such a person sits and votes, and is payable to a common informer, not to the Crown.

(*j*) *Holders of royal pensions,* except civil, military and diplomatic pensions.

(*k*) *Holders of office.* The great mass of the permanent officials of the civil service are disqualified, and are thus independent of political and party influences.

If a civil servant seeks election, he must resign his office as soon as he announces his candidature. Officers in the army, navy and air force may not seek election to the House of Commons. If a member of the House accepts a commission, he thereby vacates his seat. Judges of the High Court and the Court of Appeal are also excluded. An exception exists in the case of the holder of a political office, whose position depends on the coming in and going out of office of the government. If after election, a member was appointed a minister, he was required to seek re-election. This gave his constituents an opportunity to pronounce judgment upon the appointment and incidentally upon the work of the government up to date. On the other hand, it led to speculation as to the chances of success at a fresh election, and for this reason it was not always the best man that was selected for a minister's post. The requirement of re-election in such cases has now been abolished (*h*).

(*l*) *Persons who had not taken oaths.* Formerly, several old statutes required that a member could not sit unless he had taken certain oaths. In consequence, Roman Catholics, Jews and others were disqualified. These requirements were gradually swept away

(*h*) The Re-election of Ministers Act, 1919 & 1926.

during the nineteenth century. But the legislature had overlooked those persons who had no belief at all to make an oath binding on them. In 1880, Bradlaugh demanded to be allowed to affirm, instead of taking the oath, as he had no religious belief. This method was allowed in the law courts. The House also allowed it in Bradlaugh's case. But an informer sued him for penalties on account of sitting and voting without taking the oath. The House of Lords did not award any penalty, but held that he was not entitled to affirm in lieu of taking the oath (*i*). Then Bradlaugh said that he would take the oath, but the Commons now refused to allow him to do so, and excluded him from the House. This action was upheld by the courts (*j*). In 1884, Bradlaugh walked up to the table without being called upon by the Speaker, and producing a small Bible out of his pocket, proceeded to swear himself, before any one knew what was going on, and voted in a division. This time the Crown sued him for the penalty which he had incurred by so voting. It was held that the absence of religious belief made it impossible for him to take a valid oath (*k*). In the new Parliament of 1886, Bradlaugh took the oath among other members. The Speaker declined to intervene, and observed that the honourable member took the oath under whatever risks may attach to him in a court of law. Since 1888, the law has permitted an affirmation instead of an oath in all cases where an oath offends against a person's religious belief or he has no religious belief (*l*).

(*i*) *Bradlaugh* v. *Clarke*, (1883) 8 A.C. 354.
(*j*) *Bradlaugh* v. *Gossett* (1884), 2 Q.B.D. 271.
(*k*) *Attorney-General* v. *Bradlaugh* (1885), 14 Q.B.D. 667.
(*l*) Oaths Act, 1888.

Resignation.—A member cannot resign his seat. If he wishes to resign, he must accept an office which disqualifies him from membership, such as the Stewardship of the Chiltern Hundreds or the Stewardship of the Manor of Northstead. These offices are expressly excepted from the operation of the Re-election of Ministers Acts. Their importance is purely nominal, and a member's application for one of these posts is granted as a matter of course.

System of Voting.—In a single-member constituency, each elector votes for one candidate. There are today more than two political parties, and the adequate representation of minorities is very difficult. Frequently there is a serious disproportion between the number of votes a party secures in the country and the number of seats it secures in the House of Commons. The Conservative government of 1925 had actually a majority of over two hundred in the House over the Liberal and Labour branches of the opposition, though it was in a minority of nearly three million votes in the country. The government represented less than half the votes cast. Proposals for reform have been discussed in various quarters but no decision has yet been made.

Bribery and Corruption at Elections.—The common law treated bribery at elections as an offence. The policy of the legislature has been in the same direction (*m*). Corrupt practices imply guilty knowledge or intention, and take various forms. *Bribery* makes both the briber and the bribed guilty, even when it is given the colour of *bona fide* expenditure of money such as the employment of a person to render services which are not needed. *Treating* is a form of bribery in which the reward offered is food, drink or some other entertainment. The assuming of a false identity at the polls constitutes the offence of *personation* and is punishable with two years' imprisonment. *Undue influence* consists in using physical or moral force or threats to influence an elector. Any one guilty of a corrupt practice of any kind loses all electoral rights and all capacity for public office for seven years. Bribery, treating and undue influence are

(*m*) Corrupt Practices Act, 1883.

punishable with imprisonment for one year or a fine of £200.

Illegal practices do not involve an intention to disregard the law, and include the hiring of motor cars and other conveyances to convey electors to the polls, expenditure on the part of a candidate or his election agent in excess of the maximum laid down by the legislature, false statements of fact about candidates even if they do not amount to defamation, and acting in a disorderly manner at a political meeting in order to prevent the organizers from proceeding with the business according to their programme (*n*). Any one guilty of an illegal practice is liable to a fine of £100 and is debarred from voting at any election in the same constituency for a period of five years.

Disputed Elections.—At one time the House of Commons claimed the right to decide disputed elections, but they are now decided by the courts (*o*). The trial is conducted by two High Court judges sitting in the borough or county in which the election took place. Their findings are notified to the Speaker, and entered upon the journals of the House.

Members' Responsibility.—A member's duty is to serve the whole realm, and not merely his own constituency or his own party. He is a representative, not a delegate. He need not consult his constituents or follow their instructions, unless he himself deems it fit and proper to do so. His duty is to vote in the House for proposals which he considers to be in the interest of the country as a whole and not merely that of any particular party or section. "Parliament", said Burke, "is not a congress of ambassadors from different and hostile interests ; . . . . parliament is a deliberative assembly of one nation, with one interest, that of the whole . . . . *You choose a member indeed ; but when you have chosen him, he is not a member of Bristol, but he is member of parliament*"(*p*).

Member's duty is to the whole country.

(*n*) Public Meetings Act, 1908.
(*o*) Parliamentary Elections Act, 1868.
(*p*) *Address to the Electors of Bristol*, 1780.

A member may discuss and criticise a measure freely, and oppose it with all his strength if he deems it contrary to the best interests of the realm. But if he does not carry the House with himself, he must accept defeat with good grace, and do nothing which might embarrass the administration or prejudice the national interest. This is the English parliamentary tradition at its best. The passing of the Reform Bill of 1867 aroused controversies at once most fierce and bitter. "It is the duty," said Lord Salisbury, "of every Englishman, and of every English party to accept a political defeat cordially and to lend their best endeavours to secure the success, or to neutralize the evil, of the principles to which they have been forced to succumb. England has committed many mistakes as a nation in the course of her history, but the mischief has been more than corrected by the heartiness with which, after each great struggle, victors and vanquished have forgotten their former battles and have combined together to lead the new policy to its best results. We have no wish to be unfaithful to so wholesome a tradition. As far, therefore, as our Liberal adversaries are concerned, we shall dismiss the long controversy with the expression of an earnest hope that their sanguine confidence may prove in the results to have been wiser than our fears"(*q*).

After defeat, he must not embarrass the government.

(*q*) In a speech in 1867.

Chapter IV

ASSEMBLING AND DISSOLUTION

Assembling.—The King *may*, by virtue of his prerogative, dissolve Parliament at any time on the advice of the Prime Minister. It *must* be dissolved when it has existed for five years, unless its life is extended by an Act of Parliament. Upon a dissolution, it ceases to exist. It comes into being when the King summons a new Parliament. No law requires that Parliament must meet every year. But since legislation relating to public finance and other essential business is passed only for one year, it must be renewed annually. It is therefore necessary that Parliament must meet at least once every year. The practice is to maintain the existence of Parliament continuously. The same proclamation which dissolves a Parliament also announces "Our royal will and pleasure to call a new Parliament" and orders the issue of writs to the Lords Spiritual and Temporal and to the sheriffs and returning officers of counties and boroughs. On a day fixed in the writ for the meeting of Parliament, the Commons are called to the House of Lords, and the King formally opens the Parliament. The Commons then retire to choose their essential officer, the Speaker, and to take the oath of allegiance. On a later date the Commons proceed again to the House of Lords when the King's Speech from the Throne is read, indicating the broad lines of the government's policy. The Houses then proceed to business in their respective chambers.

Parliament must meet every year.

Adjournment.—Each House continues the session by its own authority from day to day. This is known as adjournment. Sometimes the adjournment may be for a longer period as at Christmas or Easter. Each House adjourns separately and independently of the other, and business is resumed after the adjournment where it was left off. When a House has adjourned for more than

fourteen days, the Crown may by six days' notice, call upon it to meet earlier (*a*).

Prorogation.—Prorogation puts an end to a session of Parliament. It is effected by the King's authority only. It applies to both Houses at the same time, not to an individual House. It must be distinguished from a dissolution, which puts an end to the existence of Parliament. Prorogation does not touch its existence. In fact the King's order for prorogation also fixes the date for the re-assembling of Parliament. However it terminates all pending business, and a Bill which is thus extinguished must begin from the earliest stage when Parliament is summoned again. Prorogation is for a specified period, but the King may postpone or accelerate the meeting of Parliament.

Dissolution.—Dissolution puts an end to the existence of a Parliament. It may take place by an exercise of the royal prerogative, or by lapse of the statutory period of five years. The King dissolves Parliament at the request of the Prime Minister, and not without it. In former times, the death of the King effected a dissolution of Parliament. The King had summoned the Lords and the Commons by writ to confer with him. When he died, the invitation lapsed, and the Parliament was thereby dissolved. The inconvenience entailed by this theory has been removed, and the duration of a Parliament is now independent of the life of the King (*b*).

In brief, the terms adjournment, prorogation and dissolution refer to the end of a sitting, the end of a session, and the end of a Parliament.

(*a*) Meeting of Parliament Act, 1870, s. 2.
(*b*) Representation of the People Act, 1867.

CHAPTER V

THE PRESIDING OFFICERS

The Lord Chancellor.—Each House functions under a Speaker. In the Upper House the Speaker is the Lord Chancellor who is an official of the Crown rather than the elected president of the House of Lords. To officiate as Speaker, the Lord Chancellor need not necessarily be a peer, though he almost invariably is so.

An official President.

As Speaker, he sits upon the Woolsack, which is technically outside the precincts of the House. In his absence a deputy Speaker performs his duties.

The Lord Chancellor may vote in any division, but he has no casting vote. In case of equality of votes in the Lords, the negative opinion prevails.

The Lords are the sole judges of their own procedure. It does not appear that the Lord Chancellor has any disciplinary power over the peers, who in fact address their speeches to the rest of the lords in general and not to the chair. In addressing the House the Lord Chancellor has precedence by courtesy. But if two or more lords rise to speak at the same time, the House decides, sometimes by means of a division, which noble lord shall first address it.

No disciplinary power.

The Speaker.—The Speaker of the House of Commons is always a member of the House, and is elected to the chair by its vote, subject however, to the approval of the King. He is selected in the first instance by the party with a majority in the House, usually in consultation with other parties, in order to secure a unanimous choice. On election he becomes independent of party. If he desires to continue his services in a new Parliament, it is customary to re-elect him, unopposed, to the House and to the Speaker's chair, whatever party may be in power (*a*).

Speaker has no party.

He may not participate in debate except when the House sits in Committee. But it would be considered

(*a*) At the general elections of 1935 the Speaker was opposed, but was elected by a large majority.

inconsistent with his position of absolute impartiality that he should take part in debate even in Committee. The Speaker has a casting vote in case of equality of votes, but apart from this he does not vote at all.

Relatively, the Speaker is far more important in the House of Commons than the Lord Chancellor in the House of Lords. It is through the Speaker that the Commons communicate with the King. He decides whether a Bill is a Money Bill for the purposes of the Parliament Act, 1911. He regulates debate, and keeps order in the House. He is the 'first commoner', and ranks immediately after the peers of the realm. The privileges of the Commons are in his keeping (*b*). He hardly speaks at all. He is called the Speaker because in olden days, when the House of Commons wanted to make a protest or a statement to the King, it was he who spoke for it. In its collective capacity, the representative and spokesman of the House is Mr. Speaker.

Spokesman of the Commons.

He presides at sittings of the House, and declares and interprets its law as sole exponent. Whenever precedents and orders of the House do not give adequate guidance, he suggests a course in keeping with its traditions and dignity. His decisions are almost invariably accepted, and for many generations he has received habitual deference from all quarters. He enforces decorum and laws of courtesy between members. He must remain calm in the midst of storms. He receives a liberal salary and has an official residence. He can claim from the royal forests a buck and a doe twice a year. On retirement he gets a pension, and is offered a peerage.

Deference.

• (*b*) Sir William Lenthal was Speaker of the House when Charles I strode into the chamber with a troop of soldiers and tried to arrest five of its members. But the offending members had been warned and had vanished from the chamber before the King arrived. Advancing to the Speaker's chair, Charles demanded to know whether any of the five members were present. Lenthal fell on his knees and replied, "May it please your Majesty. I have neither eyes to see nor tongue to speak in this place but as this House is pleased to direct me." "I see", said the King, "that all my birds are flown", and with that the crest-fallen monarch stalked out of the House amid cries of "Privilege! Privilege!"
Munro—*Governments of Europe*, 1932, at pp. 168-169.

CHAPTER VI

LEGISLATIVE PROCEDURE

Acts of Parliament.—Every Act begins as a Bill. Normally, a Bill, in order to become an Act must pass both Houses. In all cases it must receive the Royal Assent. Otherwise it will remain only a Bill and can have no statutory force. A Public Bill, that is one affecting the community at large, may be introduced by the government or by a private member. For the most part, such Bills are introduced in the House of Commons, but they may be introduced in the other House. Normally, leave to introduce it is given without opposition. The first reading is purely formal. The Bill is printed and becomes available for perusal by members and others.

First reading.

On the second reading, the principles underlying the Bill are discussed, but members are not allowed to move amendments. When it has passed the second reading, the provisions of the Bill are considered in detail. It is referred to one of the five standing committees consisting of between forty and sixty members. If the Bill is very important, the whole House may sit as a committee for its detailed discussion. In that case the Speaker quits his chair which is then taken by the chairman of committees. The Bill is discussed clause by clause, amendments are freely moved, and members may speak any number of times. The Bill is then reported to the House as it emerges from the committee. This is known as the report stage, and during discussion amendments and alterations may be made. Finally, when the Bill has passed the third reading, the Clerk of the Commons carries it to the House of Lords.

Second reading.

Committee stage.

Report stage.

Third reading.

In the Lords.—When the Bill comes up to the Lords, it passes through the same stages as in the Commons. The Lords may reject it or may amend it. But they have no power to amend a Finance or other Money Bill. If they amend a Bill, they return it to the Commons,

requesting their concurrence in their amendments. In case of a difference of opinion, informal negotiations take place between the party leaders in the two Houses. But if no agreement is arrived at, the Bill drops as in case of rejection. When the Houses agree on a measure, it is lodged at the House of Lords for the Royal Assent.

Parliament Act, 1911.—This act provides a method by which the concurrence of the Lords is no longer a necessary element in legislation. Normally, all laws are enacted by the King, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled, and by their authority. The legislative function is tripartite. Under the Parliament Act, the Lords cannot prevent a Money Bill (*a*) from becoming law by throwing it out. They may criticise it, but they cannot even amend it. If they reject it, or if they fail to pass it within one month after it reaches them, it may be sent up to the King without the Lords' concurrence, and becomes law on receiving the Royal Assent. The functions of the House of Lords therefore with regard to such Bills are no longer of importance.

Money Bills.

In respect of a Public Bill which is not a Money Bill, if it is sent up to the Lords in the same form in three successive sessions, whether of the same Parliament or not, at least one month before the end of the session, and it is rejected by the Lords in each of these sessions, it may be presented direct to the King. In spite of rejection by the Lords, it will become law upon receiving the Royal Assent. But two years must have elapsed between the second reading of the Bill in the House of Commons in the first session and its final passing in that House in the third session. But this Act cannot be used in order to extend the life of Parliament without the concurrence of the Lords.

Other Public Bills.

Before 1911 and After.—Before 1911, for some centuries, a convention had existed that the Commons alone should have the right to initiate financial legislation,

(*a*) A Money Bill is one which provides for the raising or spending of money. When the Speaker has certified a Bill to be a Money Bill the certificate is final and cannot be questioned.

that the Lords may not amend such legislation sent up by the Commons, though they may reject the proposal altogether. But this right of rejection was practically never exercised, and the Commons remained in sole control of financial legislation. Under the Parliament Act, rejection by the Lords is inoperative as soon as one month has expired from the date on which the Bill first reached them.

As for non-Money Bills, the Lords have now merely a suspensive veto for two years. Before 1911, the Lords were a necessary party to every Act of Parliament. Since that year, the Upper House functions as a constituent part of the legislature only in those cases where the Parliament Act does not apply. But the suspensive veto of the Lords may, on occasion, prove of great value in focussing the public eye upon the provisions of a Bill rejected by them.

Only a suspensive veto.

Initiative of the Lords.—With the exception of Money Bills, legislation on any subject may originate in the House of Lords. In such a case the procedure of the two Houses is much the same, though there are minor differences of detail. Thus, a peer of Parliament does not require leave to introduce a Bill. Any member may present a Bill and have it laid upon the table.

The Royal Assent.—The Royal Assent is given to a Bill in person or by commission. In the former case, the King sends for the Commons to the bar of the House of Lords. The titles of the various Bills passed by the Houses of Parliament are read out by a Clerk of Parliament, who then utters in old French the formula "*le roy le veult*" (the King wills it). Usually the King signs a commission asking three members of the House of Lords to give assent on his behalf.

In law, the King has the right to veto a Bill presented to him in due course. But this right has not been exercised for over two centuries, and it is now generally understood that the King's part in Parliamentary legislation is purely formal, and that his veto may safely be regarded as obsolete.

King's veto obsolete.

CHAPTER VII

LEGISLATIVE PROCEDURE (CONTINUED)

Money Bills.—Money Bills originate in the Commons, and as has already been observed, the Lords can affect them little. Proposals for raising or spending money are made by the Crown alone through a minister. This rule effectively prevents an increase of the public expenditure, at the suggestion of members, who might agree between themselves to support each other's demands for fresh expenditure. If a member wishes to ask for an increase in expenditure, the constitutional method is to demand a decrease as a mark of disapproval. All financial legislation is considered in a committee of the whole House. On such occasions, the House sits as a Committee of Supply, and allocates money to different state purposes; and it sits as a Committee of Ways and Means to determine whether the necessary money is to be drawn from the Consolidated Fund or to be raised by new taxation. The resolutions of the latter committee are presented in the form of two Bills: *firstly*, the Appropriation Bill which settles what amounts different departments are to have, *secondly*, the Finance Bill (the Budget) which settles the year's taxation. The Finance Bill usually takes a great deal of time to pass the House. In order that the new taxes may be collected at once, the practice grew up for the House to decide by resolution that on the passing of the Finance Bill, the new taxes should have retrospective effect from the date of such resolution. These taxes were actually collected as if there were legal authority for collection. In 1912, the Bank of England collected dividends for a certain client, and paid him the amount of the dividends after deducting income tax voted by the Commons but not yet embodied in an Act of Parliament. The client sued for the return of the money deducted, and his suit was upheld by the courts (*a*). To meet this situation

Exclusively for the Commons.

(*a*) *Bowles* v. *Bank of England*, [1913] 1 Ch. 57.

legislation was passed which legalised provisional collection of new taxes (*b*).

Another point which may be noted in connection with Money Bills is, that the formula of the Royal Assent differs materially from the formula employed in connection with other Public Bills. It runs thus: "The King thanks his good subjects, accepts their benevolence and wills it so".

Private Bills.—A Private Bill must be distinguished from a Public Bill which happens to be introduced by a private member instead of a minister of the Crown. It is a measure for the particular interest or benefit of a person or group of persons, a corporation, a parish, a city, a county or other locality: not a measure of public policy in which the whole community is interested. It deals with matters such as water, drainage, railways, tramways, names, naturalization, etc.

Deal with particular interests only.

It is initiated by a petition, which is carefully scrutinized by the Examiners of Private Bills to see if it complies with the standing orders. These orders are intended to ensure that the subject-matter of the Bill should be made widely known to all persons affected by it, so that they may be able to prepare opposition. If the Examiners are satisfied, the Bill is introduced in the Commons or the Lords. As a rule, the first and second readings of the Bill take place without opposition. Then, it is referred to a small committee, where proceedings are of a judicial nature. It hears parties who are in favour of the Bill and against it, either in person or through counsel, and examines witnesses. It may then report the Bill, with amendments if any, to the House, where it is read a third time. After that, it is sent to the other House, and goes through the same forms. Finally it is presented for the Royal Assent, on receipt of which it becomes an Act.

Petition.

Proceedings judicial.

Provisional Order Bills.—This form of legislation is particularly useful in connection with what are known

(*b*) Provisional Collection of Taxes Act, 1913.

as Provisional Order Bills. Some government departments have power, after departmental investigation, to authorise local bodies or companies, provisionally, to proceed with useful public undertakings, subject to the approval of Parliament. Periodically their orders are grouped together and then appended, as a schedule, to a Provisional Order Bill, which is usually passed without much discussion. Under this procedure, the heavy expenditure usually incurred in connection with a Private Bill is avoided; Parliament is spared the necessity of devoting its time to purely local interests; and the measure passed avoids the criticism of being delegated legislation. The procedure is simplified, but every side of the case is carefully heard before Parliament passes an Act which may affect the existing rights of individuals.

Curtailment of Debates.—A Bill can be fully discussed at the time of the second reading, in committee, and at the report stage. But owing to pressure of work, it is necessary at times to curtail debate. At any stage, therefore, a member may move that the question may now be put. The Speaker (or Chairman) may refuse the motion. But if he accepts it and it is carried, the pending debate at once comes to an end. No discussion is allowed on such a motion, but the majority side must number at least one hundred. This method is called the '*closure*.'

Closure.

At the report stage, the Speaker may decide which of the proposed amendments and additions are fit for discussion. The rest are then left out completely. The same power may be exercised by the Chairman when the whole House sits as a Committee. This is known as the '*Kangaroo*' closure.

Kangaroo.

A still more drastic method is for the House to pass a resolution allotting a definite period of time to each portion of a Bill. This is known as the '*guillotine*' (c). When that time has expired, the guillotine falls, and

Guillotine.

(c) Literally, a machine with a knife blade used in former times for beheading.

no further discussion is allowed on that portion of the Bill which is then before the House. It is immediately voted upon. The government of the day decide upon an allocation of time which is carried in the House by means of their majority. At the time fixed, the guillotine works automatically without the Speaker's leave and there is no appeal against it. It is a powerful weapon in the hands of the government. It has sometimes cut short or precluded vital discussion. Its merit is that it enables the government to deal effectively with obstructionist tactics, and in all cases, to get necessary legislation passed by the Commons within a definite date.

CHAPTER VIII

FUNCTIONS OF PARLIAMENT

Legislation.—The point has been stressed in preceding chapters that the most important function of Parliament is legislation. The King and the two Houses may legislate on any topic. No court can declare an Act of Parliament unconstitutional. Nor will a court consider whether a certain Act has been passed regularly, that is, in accordance with correct procedure. "All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a Bill has passed both Houses and received the Royal Assent, *no Court of Justice can enquire into the mode in which it was introduced into Parliament,* nor what was done previous to its introduction or what passed in Parliament during its progress in its various stages through both Houses" (*a*). But an Act does not bind the Crown, apart from express words or necessary implication. The presumption is that Parliament legislates for the subject, not for the Sovereign. So, it has been held that the driver of a War Office motor lorry who exceeded the speed limit was free even from criminal liability (*b*). However, when the life, liberty, and property of the subject are at stake, an Act must not be interpreted to work hardship, without express unequivocal words or necessary implication (*c*). Again, while it is open to Parliament to make a radical change in the structure of government, it must do so in plain language. This cannot

Normally Acts do not bind the Crown.

Radical changes only by plain words.

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(*a*) *Per* Lord Campbell in *Edinburgh & Dalkeith Railway Co., Wanchope* (1842), 8 Cl. A.F. at p. 723.

(*b*) *Cooper* v. *Hawking*, [1904] 2 K.B. 164.

(*c*) *Central Control Board* v. *Cannon Brewery Co., Ltd.*, [1919] A.C. at p. 752; *R.* v. *Halliday*, [1917] A.C. 260; *Attorney-General* v. *De Keysers' Royal Hotel*, [1920] A.C. 508.

be done by a side-wind. A certain Act (*d*) permitted all persons whose names were on the register of a university to vote in parliamentary elections, provided such persons were of full age and not under any disability. After the passing of this Act, the university permitted the names of women graduates to be put on the register. Some such graduates claimed that they thereby became entitled to vote at parliamentary elections. The courts disallowed this claim, and Lord Loreburn, L. C. observed: "It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process." In the same case Lord Ashbourne based his judgment on the broad ground that "if it was intended to make a vast constitutional change in favour of women graduates, one would expect to find plain language and express statement" (*e*).

Delegated legislation.

Of late, delegated legislation has come to the forefront. But such legislation is passed under powers conferred by Parliament, which can modify or even revoke them at will. However, it is an undisputed fact that, as a matter of working practice, government departments have acquired real power in this connection.

All legislation is cabinet's legislation.

It is also to be noted that the legislation which Parliament passes is, in fact, the cabinet's legislation, or even legislation by an individual minister. A private member, no doubt, is entitled to introduce a Public Bill, but its chances of becoming law are few, unless the government either allows sufficient time for its discussion or adopts it as its own measure after the second reading.

Taxation only by Act of Parliament.

Taxation.—All taxation is really a variety of legislation. It is therefore part of the exclusive functions of Parliament. The imposition of taxes must be authorized by statute. The Bill of Rights, 1689, finally settled that there would be no taxation in

(*d*) Representation of the People Act, 1868.
(*e*) *Nairn* v. *University of St. Andrews*, [1909] A.C. 147.

England except under authority of an Act of Parliament. During the Great War, the Food Controller granted a license to a dairy company to purchase milk, and exacted an undertaking from the company to pay him 2*d*. per gallon on all milk purchased under the license. It was held that the imposition of the charge could only be properly described as a tax, which could be levied under statutory authority alone. The money payable under the agreement could not therefore be recovered. In the course of his judgment Lord Justice Atkin observed: "................if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), *he must show, in clear terms, that Parliament has authorized the particular charge.* The intention of the Legislature is to be inferred from the language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute; but in view of the historic struggle of the Legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the Court to believe that the Legislature had sacrificed all the well-known checks and precautions, and, not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with the department" (*f*).

Questions.—Members may ask questions at the commencement of business each day. They must be addressed to a minister and must relate to his department. They must ask for information, and according to the rules must not contain any "argument, inference, imputation, epithet, or ironical expression". They must not refer to purely internal affairs of a foreign country or a Dominion. They must not attack the Crown, Dominion Governors, judges, members of either House,

(*f*) *Attorney-General* v. *Wilts United Dairies* (1921), 37 L.T.R. 884.

etc. Mr. Speaker may disallow a question at his discretion, and a minister may refuse to answer it, if he deems such a course to be in the public interest.

Questions ventilate grievances.

Questions serve a very useful purpose as providing a summary method for ventilation of grievances.

Petitions.—Parliament receives petitions from the subject. They must be presented by a member. A Select Committee considers them in the first instance. If it so directs, they are circulated among members. They may be debated.

Committees of Enquiry.—Either House may appoint a committee to enquire into any public matter. Such an enquiry may be regarded as an indication of no confidence in the government. The committee may include some members from outside the Houses, and can examine witnesses on oath. If both Houses appoint a committee to enquire into a matter of urgent importance, it may be given the powers of the High Court regarding witnesses and documents (*g*).

Addresses of Removal.—Judges and certain other officers can be removed from office only when both Houses present an address to the Crown demanding their removal. The proceedings relating to such an address assume a judicial character, and the evidence against the person charged is heard by a committee, and later, at the bar of the House.

Control over the Executive.—The actual control of Parliament over departmental expenditure and over legislation is, it has already been pointed out, nominal. It has no executive authority. But the level of debates in Parliament on questions of expenditure and general policy is oftentimes very high ; and though their immediate effect may be small, they do affect the subsequent policy of the government and the administration of laws. Ministers are present in Parliament, and the daily question hour provides an opportunity to members to draw public attention to many inconvenient topics, and to obtain some explanation regarding the conduct of current

Only indirect control.

(*g*) Tribunals of Enquiry (Evidence) Act, 1921.

affairs. Parliament can pass votes of censure and votes of no-confidence, and thus pronounce judgment on the ministers of the Crown. Both Houses receive reports of the working of the various departments. It is only with the consent of Parliament that the Crown can keep a standing army in peace time. Parliament may, in the last resort, withhold all supplies from the King. It exercises a constant supervision over all governmental affairs, and on occasion, motions are brought forward criticising the government or a particular minister. But the weakness of the position is that the party system makes it difficult to oppose the cabinet beyond a certain degree. Also, Parliament is generally pressed for time, and cannot give adequate attention to every important question. Nevertheless, the general feeling in Parliament is taken by the government as an indication of the feeling in the country.

Parliament has certain important judicial functions. These will be considered more appropriately when we deal with the judiciary.

CHAPTER IX

PRIVILEGES OF PARLIAMENT

Privileges.—Certain privileges, that is immunities and safeguards, have been deemed necessary for the protection of the two Houses which together constitute the High Court of Parliament. The subjects of the realm derive benefit from the exercise of its functions, and the privileges of Parliament help to maintain the dignity and independence of each House and of its members. All the privileges that can be required for the energetic discharge of the duties inherent in their high trust are conceded in all respects without a murmur or a doubt. For a long time, the two Houses claimed privileges in order to maintain their independence against the Crown. They exist as against private parties also. But whenever an attempt has been made at an extension of power which may invade the rights of others, the courts have refused to admit such arbitrary claims. "All persons ought to be very tender," said Lord Denman, "in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of these privileges. But power, and especially the power of invading the rights of others, is a very different thing; it is to be regarded, not with tenderness, but with jealousy; and unless the legality of it be most clearly established, those who act under it must be answerable for the consequences" (a).

Privileges freely conceded.

But arbitrary claims resisted.

From early times the House of Lords has enjoyed its privileges on the ground that the lords "have place and voice in Parliament". The House therefore does not demand the confirmation of its privileges by the Crown at the commencement of each Parliament. But since the

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(a) See *Stockdale* v. *Hansard* (1839), 9 A.E. 1.

time of Henry VIII, at the beginning of a new Parliament, the Speaker of the House of Commons asks the King "for their ancient and undoubted rights and privileges; particularly that their persons may be free from arrests and all molestations and that they may enjoy liberty of speech in all their debates; may have access to His Majesty's Royal Person whenever occasion shall require; and that all their proceedings may receive from His Majesty the most favourable construction". The House may enforce its privileges by admonition, reprimand, commitment to the custody of the sergeant-at-arms or to prison, fine or expulsion.

The Speaker demands privileges.

The Lords.—While the Commons have a right of collective access to the Sovereign through the Speaker, each peer may individually claim such access. Also peers have the right to try and be tried by fellow peers for treason or felony or misprision of either. But this is really a privilege of peerage and not of the House of Lords. The House has the right to exclude disqualified persons. It determines the validity of new creations to the peerage. Claims to old peerages are decided by a committee of the House, but only after they have been referred by the Crown to the Lords. The House is not bound by its own previous decisions. Each peer of Parliament has a right to record a protest in the journal of the House against a measure of which he disapproves.

The Lords have in addition the privilege of freedom from arrest. This includes civil arrest only. The privilege may be claimed forty days before Parliament sits, during the session and forty days thereafter. The servants of a peer of Parliament have a similar privilege during the session and twenty days before and after. The Lords enjoy freedom of speech. But this privilege has not been questioned so frequently or so definitely in their case as it has been in the case of the Commons. The Lords can commit a person for contempt for a definite term, and prorogation of Parliament does not terminate the imprisonment.

A peer may decline to attend in court as a witness, but he is not supposed to take advantage of this right. The right to vote by proxy is now probably obsolete.

A peer is exempt from service as a juryman. If a temporal or a spiritual peer is passing through a royal forest *en route* to or from Parliament, he may kill one of the royal deer without warrant in view of the ranger if present, or on blowing a horn if he be not present, so that it may not seem as if the royal venison is being taken by stealth (*b*).

The Commons' Freedom of Speech.—The Commons' right to freedom of speech has been established by a long line of cases. Finally, the Bill of Rights, 1689, provided "that the freedom of speech or debate or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament." This freedom of speech holds good not only against the Crown, but against private individuals also. No court will entertain a suit in respect of a statement made by a member in the course of parliamentary proceedings. Nor will any suit lie for any publication among members of Parliament by order of the House. But though a speech inside the House is protected, if a member publishes his speech outside he is liable to a suit for defamation (*c*).

No suit for words spoken in Parliament.

The House has always claimed in addition the right to privacy of debate. It has excluded strangers from its debates whenever it has thought fit to do so. Formerly it used to prohibit publication of its proceedings, but since the famous conflict with John Wilkes in 1771, the House has not insisted upon this privilege. But it may do so at any time and resolve that publication is a breach of privilege.

Commons exclude strangers.

In 1837, the Commons claimed a privilege for defamatory words printed by their authority even for circulation outside. This led to the famous case of *Stockdale* v. *Hansard*. The defendant pleaded that he had acted under an order of the House of Commons, which is a court superior to any court of law; that the House had declared that the power of publishing such reports is an

Stockdale v. *Hansard.*

(*b*) Stephen's *Commentaries*, 14th Ed., Vol. II, p. 376.
(*c*) *R.* v. *Creevey* (1813), 1 M & S. 278.

essential incident to the constitutional functions of Parliament; that each House was the sole judge of its own privileges and that no court could question any resolution of the House declaratory of its privilege.

Commons' order no defence for libel.

The judges held that an order of the House of Commons would not justify any one in publishing a libel. Stockdale filed another suit. The House of Commons took offence, and resolved that there was a breach of its privilege, that no court of justice could deal with any question of parliamentary privilege, that the declaration by the House of any privilege was binding upon all courts, that it was a privilege of the House to order publication of papers without involving the persons concerned in the publication in any liability. The printer was asked to base his defence solely upon the order of the House. This was an extravagant claim. It meant that a mere assertion of the House was enough to establish its privileges, even in transactions outside Parliament, and that no court could enquire into their extent and applicability. In short, this single branch of Parliament was claiming to be above the law as truly as the Stuart monarchs ever did. The court decided against the plea of privilege. Stockdale was awarded £600 damages, and the sheriff of Middlesex levied that amount from the printer.

Commons claim privilege for publications.

Contempt of privilege.

The House regarded this as contempt of its privilege, and committed the sheriff to prison, as also Stockdale and his solicitor. The court held that they had no power to set the prisoners free, even though the sheriff had only done what the court had declared to be his legal duty. "We must presume" said the judges, "that *when any court, much more when either House of Parliament, acting on great legal authority, takes upon itself to pronounce a contempt, it is so*" (*d*). It was an intolerable situation that Stockdale should be in possession of a verdict from the Queen's Bench, yet he,

Courts will not enquire into contempt.

(*d*) *The case of the Sheriff of Middlesex* (1840), II A. & E. 273.

his solicitor and the sheriff should all be in prison for getting it and trying to carry it out. To prevent the recurrence of such a situation, a new Act (*e*) was passed which provides that neither civil nor criminal proceedings can be taken in respect of statements, however defamatory, which are contained in a paper printed by order of the House.

Newspapers may publish fair reports.

As regards a report of a speech published without authority from the House, the courts have held that an editor of a newspaper cannot be sued for publishing a fair and honest report of something said in Parliament, even though the remarks he reports are untrue and injuriously affect the character of an individual (*f*). But to this day reports are made on sufferance, and published on sufferance. The House of Commons may still exclude strangers from its debates, as it did during the Great War, and prohibit their publication. The Houses have claimed the right to determine privileges. The courts decide whether an alleged privilege is valid or not.

Freedom from Arrest.—The privilege of freedom from arrest does not apply in case of treason, felony or contempt of court. In such cases a peer or member of either House is as liable as any other subject. Besides, the immunity can be claimed only during the actual sitting of Parliament and for forty days before the actual sitting of Parliament and for forty days after it. Civil arrest is now very rare, and this privilege is of little practical importance today.

Power to Punish for Contempt.—The House of Lords has power to fine and to imprison an offending party. It can imprison for a specified period which may continue beyond the duration of the session. It has not imposed a fine in recent times, but the power exists. The House of Commons has not imposed a fine since 1666, and the power to do so is probably obsolete. Any imprisonment which it orders comes to an end with the end of the session.

(*e*) Parliamentary Papers Act, 1840.
(*f*) *Wason* v. *Walter* (1868), L.R. 4 Q.B. 73.

The power to imprison is a strong weapon, and the offences to which it can be applied are not defined. Its exercise can therefore be arbitrary. Nor are the remedies usually open to a prisoner available to a person imprisoned for contempt. Early in the eighteenth century, an elector sued a returning officer who had wrongfully refused to allow him to vote, though he was fully entitled to do so. The House of Commons resolved that the elector had committed a breach of its privileges in applying to the court for relief rather than to the House. But the House of Lords as the final court of appeal, upheld the claims of the elector (*g*). Thereupon a dispute arose between the two Houses. In the meantime, five other men brought similar actions. The House of Commons committed them for contempt. The court held that since the Speaker's warrant expressly committed them for contempt, the court could not enquire what the contempt was (*h*). The matter was ended by prorogation of Parliament.

This dispute arose from a curious confusion of ideas. There is no doubt that the House of Commons had the right to determine the validity of an election, and to decide who were and who were not qualified to vote. Equally, it is certain that the courts had a right to try a suit for withholding the franchise from a man entitled to it. For a long time the practice has prevailed that when a superior court has committed a person for contempt another court will not enquire into the order of committal. The courts have taken the same attitude when a House has committed a person for contempt. "If a commitment," said Lord Ellenborough, "appeared to be for a contempt of the House of Commons generally, I would neither in the case of that court nor of any of the superior courts enquire further" (*i*). The same view prevailed in the case of the sheriff of Middlesex (*j*), though he had only

Courts not competent to pronounce on contempt.

(*g*) *Ashby* v. *White* (1704), 2 Ld. Ray. 938.
(*h*) *Reg.* v. *Paty* 2 (1705), 2 Ld. Ray. 1105 (known as the *case of the Men of Aylesbury*).
(*i*) In *Burdett* v. *Abbot* (1811), 14 East 1.
(*j*) *The Sheriff of Middlesex's case* (1840), 11 A. & E. 809.

done what the courts considered it to be his legal duty to do. The trouble is that Houses of Parliament may turn any incident into contempt. So also the superior courts. There have been moments of irritation in Parliament as in connection with the committal of the sheriff of Middlesex. But on the whole, this power has, of late, been exercised with a certain moderation.

Internal Proceedings.—The House of Commons controls its own proceedings and lays down its own constitution. The courts do not interfere with what happens inside Parliament, unless a crime is committed within its precincts. For its internal affairs the House lays down and enforces its own rules. Even if the interpretation put by the House upon its rules should be erroneous, the courts have no power to interfere with it directly or indirectly. When the sergeant-at-arms, acting under the order of the Commons prevented Bradlaugh from entering the House, the courts declined to interfere, as the matter was one which had arisen within the precincts of the House. "The House of Commons," said Stephen, J., "is not subject to the control of the Courts in its administration of that part of the statute-law which relates to its own internal proceedings, and the use of such actual force as may be necessary to carry into effect such a resolution is justifiable" (*k*).

Courts will not interfere in internal affairs.

Expulsion.—The House of Commons decides questions of legal disqualification for membership, and may declare a seat vacant by reason of such disqualification. But the disqualification must be such as is recognized by law. However, the Commons may expel a member whose conduct is unworthy of the House. But no rules exist on this point and the power is purely discretionary. A member who is expelled may be re-elected, and, as in the case of John Wilkes in 1769, a series of expulsions may be followed by a series of re-elections. The House cannot declare a person ineligible for election. But a member may be suspended from sitting in the House for a specified time.

(*k*) *Bradlaugh* v. *Gossett* (1894), 12 Q.B.D. 271.

Salary.—Since 1911, every member of the House of Commons has received a salary, except those receiving official salaries. Trade unions and other bodies have also sometimes paid members in return for support in the House. But contracts in respect of such payments have been declared to be contrary to public policy, and, therefore, unenforceable (*l*).

Conclusion.—Privilege, it has been observed, is to Parliament what prerogative is to the Crown. Just as prerogative powers can be exercised by the Crown without help or hindrance from Parliament or the judges, so privileges can be exercised by the Houses of Parliament without help or hindrance from the Crown or the judges. Prerogative is the discretionary authority of the Crown, privilege the discretionary authority of each House of Parliament. Of the two Lord Denman considered privilege to be the more formidable. Prerogative seeks the tedious process of law, while privilege with one voice accuses, condemns and executes. The King cannot add to his prerogative. So, neither House can create new privileges by its resolution. The courts admit that each House is the sole judge of its privileges when a recognized privilege has been infringed. But it is not for either House to decide whether or not a particular privilege exists. That decision rests with the courts, who may be compelled to pronounce about the validity of any claim as to the existence of a privilege put forth by either House. It does not point to a satisfactory state of things that assertions of privilege should be made in Parliament and denied in the courts, that the law reports and Hansard should repudiate each other.

Privilege more formidable than prerogative.

Position unsatisfactory.

(*l*) *Osborne* v. *A. S. R. S.*, [1910] A.C. p. 110 ff.

CHAPTER X

CONFLICTS BETWEEN THE LORDS AND COMMONS

Seventeenth and Eighteenth Centuries.—In 1678, the Commons passed a resolution that all Money Bills must commence in the Commons, and denied the power of the Lords to alter or amend them. In 1704 the Lords and Commons had a dispute, different in character, but of the first magnitude, over the case of *Ashby* v. *White* (*a*). The only way out of the difficulty was the prorogation of Parliament, which automatically set free the prisoners arrested by order of the Commons for contempt.

Nineteenth Century.—In 1832, the Lords were bitterly opposed to the Reform Bill. The Commons won against the Lords. King William IV was persuaded against his inclination, to hold out a threat of creating sufficient peers to carry the measure in the Lords. The House of Lords then gave in and passed the measure.

In 1860 the Lords threw out a measure for the repeal of the paper duty. They were within their legal rights. The Commons however reiterated the principle that the right of granting aids and supplies belongs to the Commons alone; that though the Lords could reject Money Bills, the Commons must regard any exercise of that right with the utmost jealousy; and finally, that the Commons had the right to impose and remit taxation and to frame bills of supply.

In 1893, the Lords threw out the Irish Home Rule Bill. But at the general election, the electorate endorsed their action, and the Lords escaped an attack from the Commons.

Present Century.—In 1906, the Plural Voting and the Education Bills were thrown out, in 1908 the Licensing Bill, and in 1909 the famous Finance Bill of Mr. Lloyd George with its land taxation. An uproar

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(*a*) (2 Anne), 1 Sm. L.C. 240.

ensued. The Prime Minister, after receiving a mandate from two general elections fought upon the issue, forced through an amendment of the powers of the House of Lords, under a threat to create sufficient peers to overcome any opposition. This amendment is to be found in the Parliament Act, 1911, in consequence of which the inferior power of the Lords now stands translated into definite constitutional terms.

It is said that barely fifty members attend the House of Lords regularly, and that over five hundred have never taken part in a debate. The chamber is overwhelmingly Conservative, and tends to be inactive when a Conservative government is in office and bitterly hostile to a government of another political complexion. There have been various proposals for its reform, but none of them has so far been adopted. Lord Rosebery once declared that the House of Lords will pass in a storm.

The ministry cannot disregard a resolution of the Commons condemning their policy or action. It must shake them, may even break them. But they can afford to disregard, and often do disregard, such a resolution passed by the Lords. In short, the executive government is responsible to the Commons, not to the Lords. But in the sphere of executive government, the Lords can, and often do, express their opinions with greater freedom than is possible in the Commons, where party discipline imposes many checks upon the speeches of members. On questions of policy and administration, the debates in the House of Lords are often very valuable. They carry weight, and indirectly influence the country and the action of the government. In other respects, the position is thoroughly unsatisfactory.

PART III

THE EXECUTIVE

CHAPTER I

THE KING

Introductory.—The Crown is the apex of the constitutional pyramid. In early periods of English history, all the powers of government were centred in the *King*. In course of time these powers have been transferred almost entirely to the *Crown*. The King and the Crown must be carefully distinguished. The King is a natural person, the Crown a legal abstraction—the supreme governing authority—the bundle of prerogatives, powers and rights of government. Its physical embodiment is the King. The whole constitutional history of England is remarkable for the steady transfer of powers and prerogatives from the King to the Crown. The personal status of the King is untouched. To this day he remains above the law. But Parliament has bound down the Crown to definite modes of procedure. However, allegiance to an abstraction is not an idea which has found favour in England. While in law the Crown is the sole authority in the state, all executive acts are done in the name of the King. The courts are the King's courts, Parliament being the highest of them. The judges are substitutes for him. All laws are his laws. The ministers are his servants. The army, navy and air force are his forces. Foreign relations are his relations with other sovereigns. Nationality is the tie of allegiance which binds the subject to the King. All honours are conferred by him. Even as regards the official church, he is its supreme head. War is declared in his name. The tax-collector is his agent. If a letter is insufficiently stamped, the post office collects a surcharge impliedly in the name of the King.

King and Crown must be distinguished.

All official acts done in King's name.

The control of Parliament over the royal prerogative began with the Magna Carta or even earlier, and was not fully completed till the nineteenth century.

Indeed, for a long time the issue was in doubt. But the crisis may be said to have passed with the Revolution of 1688. That event is a landmark in English history, from which we may date the transfer of governmental functions from the King to the Crown, from a personality to an institution. The King reigns, the Crown governs.

The King reigns, the Crown governs.

Title to the Crown.—The title to the Crown is hereditary inasmuch as on the death of the reigning King it passes to his heir. It is elective in so far as Parliament (consisting of the King and the two Houses) may pass an Act to alter the succession. The Act of Settlement, 1701, settled the throne on the Princess Sophia of Hanover (a grand-daughter of James I) and the heirs of her body, thus passing over several who were nearer the throne by hereditary right. The preamble to the Statute of Westminster, 1931, states that it would be in accord with the established constitutional position that any alteration in the law touching the succession to the throne or the royal style and titles shall require the assent not only of the Parliament of the United Kingdom but of the Parliaments of all the Dominions as well. In 1936, on the abdication of Edward VIII, the legislation which thereby became necessary, was passed with such assent (*a*).

Hereditary and elective.

Conditions of Tenure.—The descent of the Crown is subject to certain statutory conditions. A person who is or becomes a Roman Catholic cannot occupy the throne. If an actually reigning Sovereign becomes a Roman Catholic, the subjects are absolved from allegiance, and the throne will pass to the next person entitled by hereditary right, provided he or she is a Protestant (*b*). Every Sovereign must take the coronation oath. The Act of Settlement required the King to make a declaration against Roman Catholic doctrines soon after his accession. But as Roman Catholics took

King must not be a Roman Catholic.

(*a*) His Majesty's Declaration of Abdication Act, 1936.
(*b*) Bill of Rights, 1688, and Act of Settlement, 1701.

offence at the language of this declaration, it has now been provided that the King should make a simple declaration that he is a faithful Protestant, and promise to uphold the enactments which secure that only Protestants shall succeed to the throne (*c*). Every Sovereign must join the communion of the Church of England. Finally, every sovereign must take an oath for the preservation of the Established Church of England and the Presbyterian Church of Scotland (*d*).

Accession and Coronation.—The King never dies. This well-known maxim of the common law means that on the death of the reigning Sovereign the person entitled to the throne becomes King or Queen immediately, without any formality, even before the coronation. English law does not recognize any interregnum (*e*). At the coronation, first of all, the Sovereign is presented by the Archbishop of Canterbury accompanied by the Lord Chancellor, and the people accept their King. The King then takes the oath of royal duties. This part of the ceremony illustrates the contractual nature of the sovereign power. Next comes the purely religious ceremony which includes anointing with consecrated oil. Finally, homage is rendered in person by the archbishops, bishops, and peers.

The King never dies.

The de facto King.—Every King for the time being, even if he is a usurper, being *de facto* King, is recognized as King Regnant. When James II fled the country in 1688, the Houses of Parliament declared him to have vacated the throne. They set out the rights of the people and announced their choice of William and Mary as successors to the throne. Their declaration is known as the Bill of Rights, 1689. In the following year it was confirmed by an Act. William and Mary,

De facto King is King.

(*c*) Accession Declaration Act, 1910.
(*d*) Union with Scotland Act, 1706.
(*e*) When the Sovereign dies the announcement is made in the following words :—"The King is dead. Long live the King".
"It is true that the King never dies, the demise is immediately followed by the succession. There is no interval, the Sovereign always exists, the person only is changed"—
Per Lord Lyndhurst in *Viscount Canterbury* v. *Att. Gen.* (1842), 1 Phil. 321.

being then in *de facto* occupation of the Crown were lawful Sovereigns, and therefore competent to exercise the royal prerogative of giving assent to the confirming Act.

Never a Minor.—The King is never a minor. From the moment of his accession he is of full age. But if he is very young, or if he is mentally or physically incapable of performing his functions, Parliament appoints a Regent to act for him.

Style and Titles.—His present Majesty is known as George VI, by the Grace of God of Great Britain, Ireland, and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India.

Royal Family.—The King's wife is known as the Queen Consort. She is a subject of her husband and owes him allegiance. She has no share whatever in her husband's sovereign power. But she has certain prerogatives and privileges. She can claim to be tried by the peers. To compass or imagine the death of the King or of his Queen, or to violate the latter amounts to treason (*f*). If she consents to the violation she herself is guilty of treason. If the reigning Sovereign is a Queen, her husband is her subject. Queen Victoria's husband, the Prince Consort, took the oaths of allegiance and supremacy.

Treason.

The eldest son of the Sovereign is known as the Heir Apparent. Since 1284, he has always been created Prince of Wales. To compass or imagine his death, or to violate his wife is treason. The Statute of Treason also protects the chastity of the King's eldest daughter, while she is unmarried. Other near relations of the King enjoy precedence over all persons outside the royal family, but their legal status is much the same as that of ordinary subjects.

(*f*) The Statute of Treason, 1351.

Chapter II

THE ROYAL PREROGATIVE

Its Nature.—The royal prerogative consists of the special powers, pre-eminence or privilege which the Sovereign has, over and above other persons, in right of his crown. It includes all the special dignities, liberties, privileges, powers, and royalties which the common law allows to the Crown, outside its ordinary course, and which the King can exercise without the authority of Parliament. Prerogatives may be direct, or incidental. The former relate to the government of the state, for instance, the right to make war and peace. An incidental prerogative is a special privilege like the rule that debts to the King must always be preferred before debts to others. The law ascribes to the King the attribute of sovereignty or pre-eminence over all persons in the Kingdom. It attributes to him perfection: the King can do no wrong. And it attributes to him perpetuity; the King never dies. Summing up the direct prerogatives of the King, Blackstone says that he is not only the chief magistrate but the sole magistrate, because all other magistrates act by commission from him. In foreign affairs, he is the representative of his people, and can make treaties, and declare war and peace. In home affairs he is the supreme executive authority. He has the right to make appointments to all the more important offices. He is a constituent part of the legislature. He is the head of the army, the fountain of justice, and the fountain of honour, that is, he alone can create peers and confer titles. He establishes

Prerogative.

Direct.

Incidental.

The King can do no wrong.

Never dies.

Sole magistrate.

War and peace.

Appointments and legislation.

Army, justice, titles and church.

public markets. He coins money. He is the head of the Church of England.

Its History.—The origin of the prerogative may be traced to the middle ages, when the King was the absolute owner of land. From him all land was held mediately or immediately. This feudal idea has left its mark on various prerogatives. Just as the feudal lords could not be sued in their own feudal courts, the King could not be sued in his court. There was a pressing need for preservation against external foes, and the King became the military head and arranged all foreign affairs. When in course of time a central system of justice began to grow, the feudal idea weakened, and to lawyers the King appeared as very different from other feudal lords. He was the head of the state and the fountain of justice. Yet they took care to lay down that the King is subject to the law. The growth of Parliament also tended to emphasize this view. The Tudors in the sixteenth century were shrewd and able rulers, and managed to keep in obscurity any theories which may question their supremacy. But the power of Parliament was growing fast, and the challenge to the King's prerogative could not be postponed indefinitely.

Origin feudal.

King is subject to the law.

The Stuart Kings were not distinguished for tact. Under James I the country was faced with the question: 'In case of an irreconcilable difference of opinion between the King and Parliament, which is to prevail?' Seventeenth century law was not clear on this point. For the King it was argued that he was ordinarily limited by law, but in extraordinary circumstances his power was unlimited. So, the last power in the realm was the King. The Parliamentary lawyers denied this theory. In case of danger or invasion, they argued, it is the duty not only of the King but of every subject to ward off danger. A grave danger may temporarily supersede the law. Yet periods of emergency can afford no guidance for normal times. These lawyers maintained that in the event of an approaching danger the law required Parliament to be

17th Century.

summoned in order to take necessary measures of protection. The King had a twofold power, one in Parliament and the other out of Parliament. According to them, the first was the greater of these two.

King in Parliament the true sovereign.

The Revolution of 1688 finally settled that the King's view was not to prevail, that the sovereign power in the state was the King-in-Parliament, and the prerogative was subject to the law. It did not alter the law of the constitution, and theoretically the executive and the legislature being separate, a deadlock between the two was still possible. But the Revolution left Parliament the strongest power in the realm and the House of Commons the strongest power in Parliament, and each could therefore make itself felt whenever necessary. Since the Revolution, the exercise of the prerogative has more and more been in the hands of a committee of ministers—the cabinet—who hold office only so long as they enjoy the confidence of the Commons. Parliament assumed the sovereignty which was denied to the King in the seventeenth century. The royal prerogative which had its origin in the feudal conditions of society in early times, was at the Revolution definitely subordinated to the law. It still supplies the modern constitution of England with its executive power.

Commons, strongest power in Parliament.

Cabinet.

Courts of law can enquire into the existence of a prerogative right. But the nature of the evidence required by judges in respect of such rights has not been the same in all cases. "We are bound", said Hale, C.J., "to take notice of everything that belongs to the Queen's privilege" (*a*). But on another occasion, it was observed: "We are agreed that it is for the officers of the Crown to make out clearly the prerogative in any case where they claim to be on a different footing from the subject as regards procedure in any litigation (*b*).

(*a*) *Elderton's case* (1703), 2 Ld. Raym. 978, at p. 98.
(*b*) *Attorney-General to Prince of Wales* v. *Crossman* (1866), 4 H. & C. 568 at p. 575.

Prerogative and the Common Law.—Prerogative rights are drawn from the common law. They may also be derived from an Act of Parliament. Those drawn from the common law have for a long time now been well defined. The disputes which arise are usually not about their existence, but relate to the exact scope of the rights. Every time an Act of Parliament empowers the King to make regulations regarding any administrative function, the effect really is that the statute adds a prerogative right to those already enjoyed by the Crown. But by well established practice, the term prerogative is usually reserved for the common law privileges of the Crown. Prerogative rests upon the common law, though it has been supplemented and defined by a number of statutes.

Prerogative rests on common law and statute.

Limitations.—Prerogative is under the control of the courts. If ministers issue an order in excess of the prerogative rights of the Crown the courts will treat it as null and void. Thus it has been held that the grant of a monopoly by the Crown is bad, since it is void by the common law and by statute (*c*). In 1612, James I, claiming to be supreme judge, proposed to take his seat on "his" Bench (the King's Bench): *"The Kingh being the author of the Lawe is the interpreter of the Lawe"*. To this Chief Justice Coke objected. He maintained that it is not for the King but for the judges alone to interpret the law. "This means", exclaimed the King, "that I shall be under the law, which it is treason to affirm:" Coke retorted with a quotation from Bracton that the King is not under any man but under God and the law, because the law makes the King (*d*): In the present century the courts have laid down: *"It is the duty of the Crown* and of every branch of the Executive *to abide by and obey the law.* If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and *it is the duty of the Executive in*

Courts determine prerogative.

(*c*) *The Case of Monopolies* (1602), 11 Co. Rep. 84.
(*d*) Levy-Ullman, *The English Legal Traditions*, pp. 227-28.

cases of doubt to ascertain the law in order to obey it, not to disregard it" (e).

Parliament may create or extinguish a prerogative.

Secondly, while Parliament can create a prerogative right, it can also abridge, or even extinguish a prerogative without direct words to that effect. If an Act of Parliament merely lays down how certain acts are to be done, they are thereby withdrawn from the prerogative. During the Great War, in 1916, the government requisitioned a hotel in London for the use of the Royal Flying Corps, and retained possession for nearly a year. It was taken under protest, not under agreement. The proprietors of the hotel brought a Petition of Right, claiming compensation as a matter of right for the use of the premises. For the Crown it was argued that there was no legal obligation to pay compensation as there was a prerogative right to take the lands of the subject temporarily in case of emergency in war time, though the Crown might pay compensation out of its grace. Now, the Defence Act, 1842, provides a code for the acquisition of lands for purposes of the defence of the realm and lays down elaborate rules for *compensation as a matter of right* to owners of lands so taken. For the proprietors of the hotel it was argued that the Crown had taken possession under the statutes and regulations and therefore could not shield itself behind the prerogative right, under which no compensation could be claimed except as a matter of grace. The House of Lords decided against the Crown, and held that "the whole field of the prerogative in the matter of the acquisition of land has been superseded by the Act of 1842, and that therefore *there was no prerogative right left, even if any right had ever existed to requisition land in time of war without compensation"* (f).

Swinfen Eady, M.R., giving judgment in the Court of Appeal, said: "Those powers which the Executive exercises without Parliamentary authority are comprised under the comprehensive term 'prerogative'. Where,

(e) *Per* Sir George Farwell in *Eastern Trust Co.* v. *Mackenzie, Mann & Co.*, [1915] A.C. at p. 759.

(f) *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508.

however, Parliament has intervened and has provided by statute for powers previously within the prerogative being exercised in a particular manner and subject to the limitation contained in the statute, they can only be so exercised. Otherwise what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back upon prerogative?"(g) Lord Parmoor remarked in the House of Lords: "The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control and directly regulated by statute, the Executive no longer derives its authority from the royal prerogative of the Crown, but from Parliament, and that in exercising such authority the *Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject . . . . It would be an untenable proposition to suggest that Courts of Law could disregard the protective restrictions imposed by statute law where they are applicable.* In this respect the sovereignty of Parliament is supreme" (*h*). This case of the *Attorney-General* v. *De Keyser's Hotel Ltd.*, is one of great constitutional importance.

Prerogative cannot override statute.

Thirdly, prerogative rights cannot go counter to the Magna Carta, the Bill of Rights and other statutes. In particular, justice may not be sold or denied to any subject. Neither the Crown nor its ministers may interfere with the ordinary course of justice. Also, the subject may freely petition the King in case of grievance without fear of commitment or prosecution. Judges are appointed by the Crown and hold office during good behaviour, subject to a power of removal by His Majesty on an address by both Houses of Parliament (*i*).

Ministers liable for every act of the prerogative.

Fourthly, prerogative rights are exercised subject to the doctrine of ministerial responsibility. The Crown acts only upon the advice of its ministers, who must answer for breaches of law in the same way as any one else. They are also

(*g*) (1919), 2 Ch. 216.
(*h*) *Per* Lord Parmoor at pp. 575-576.
(*i*) Judicature Act, 1875.

responsible to Parliament, and must give up office on an adverse vote in the Commons, and, in the last resort, may be impeached before the House of Lords. Ministers are liable in courts of law for actual breaches of the law, also before Parliament for all errors and indiscretions. For every decision of policy and administration some minister must be identified.

CHAPTER III

THE ROYAL DIGNITY

The Royal Dignity.—The King has the attribute of sovereignty or pre-eminence above all his subjects. He is the supreme head in church and state. His person is inviolable, and no one may exercise any coercive power over him. The King never dies: upon the death of the reigning King, the heir to the throne immediately succeeds, and there is no interregnum at all. The King can do no wrong: he is immune from all civil or criminal proceedings. This privilege extends to the King's household. Property belonging to the Crown, wherever it may be, is free from execution or distress.

The Sovereign is pre-eminent.

Petition of Right.—But in those cases where the land or goods, or money of a subject have found their way into the possession of the Crown, a Petition of Right may be brought for restitutions or for compensation. So also where the claim arises out of a contract as for goods supplied to the Crown or to the public service. A Crown official, contracting for his principal (the Crown) does not make himself liable for a breach of contract. The usual doctrine of agency applies, and the principal alone is liable, unless of course, an Act of Parliament should provide otherwise (*a*).

Liability for contracts.

Torts.—In tort, on the other hand, no remedy is available against the Crown. But this irresponsiblity does not extend to its agents and servants. Every such agent or servant is personally responsible for all torts committed by him. It is no defence that the act complained of was done by him in his public capacity or on behalf of the Crown, or by the express command of the supreme executive. "The civil irresponsibility of the

For torts the agent alone is liable.

(*a*) *Graham* v. *Commissioner of Public Works*, [1901] 2 K.B. 781.

supreme power for tortious acts," the Privy Council (*b*) has observed, "could not be maintained with any show of justice if its agents were not personally responsible for them." But a public official is not responsible for the torts of his subordinates, because the relation between him and the subordinate is not that of master and servant, but of fellow servants of the Crown. He can be sued only if he has personally authorised his subordinates to commit the tort (*c*).

Exceptions.—But certain exceptions may be noted. The Minister for Transport is responsible for the acts and defaults of the servants and agents of the ministry as if they were his servants. This liability is created by statute (*d*). So also in the case of the more recently created government departments, statute has made them capable of suing and of being sued in their corporate name. In such cases, no Petition of Right will lie against the Crown for the breach of any contract entered into by the departments.

Royal Grants.—The doctrine of the King's perfection is a far-reaching one. In law he is incapable of thinking wrong or meaning to do an improper act. If a royal grant is contrary to law, the courts will merely hold that the grant is void because the Sovereign was "deceived in his grant".

Negligence or Laches.— So also, time does not run against the Crown. The King cannot be guilty of negligence or *laches*. Therefore, lapse of time does not bar civil claims by the Crown, nor does it prevent criminal prosecutions from being instituted at any time after the offence has been committed. But this common law rule has been modified by statute to a certain extent.

• **When Bound by Statute.**—Lastly, in the absence of express words or necessary implications, the Crown is not bound by an Act of Parliament. Under this rule the driver of a War Office lorry who exceeded the speed limit was excused even from criminal liability (*e*). In statutes

(*b*) *Rodgers* v. *Rajendro Dutt* (1860), 13 Moore, P.C. at p. 236.
(*c*) *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.
(*d*) Ministry of Transport Act, 1919.
(*e*) *Cooper* v. *Hawkins*, [1904] 2 K.B. 164.

relating to the patent rights of inventors, Parliament is careful to provide that the patent rights shall hold against the Crown. Otherwise any government department could use the patent without making payment to the inventor. But it is always open to the Crown to take the *benefit* of any Act.

CHAPTER IV

THE ROYAL AUTHORITY

Head of the Executive.—The King is the supreme head of the executive. It is difficult to make a list of all his prerogative rights. Some of them have been greatly modified, and even abrogated by statute. Some have certainly been lost by disuse. The existence and limits of others raise difficult controversies. Legislation and taxation are now controlled by Parliament. Judges have a monopoly of judicial power. Yet prerogative rights are by no means trifling. Bagehot, in the last century, enumerated some of the things that Queen Victoria could have done without consulting Parliament. The list applies equally to King George VI and his ministers.

Prerogative rights enormous to this day.

"Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the General Commanding-in-Chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a 'university'; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the government" (*a*).

The prerogative of the Crown with regard to Parliament has been discussed in a preceding chapter. We shall proceed to consider its authority in various departments of foreign and internal affairs.

(*a*) Bagehot, *English Constitution*, World's Classics ed., pp. 283-284.

Chapter V

FOREIGN AFFAIRS

Foreign Affairs.—The Crown enjoys very wide prerogative powers in the realm of foreign affairs, both as regards peaceful and hostile relations. It has an absolute discretion with regard to sending ambassadors and other diplomatic agents to foreign countries and receiving such agents at home. It can recognize a newly constituted state or a revolutionary government, as it did in the case of the Bolshevist government in 1924. It makes treaties, and declares war and peace. In modern times, the conduct of such affairs is actually in the hands of ministers who command confidence in the country. But it is only recently that the practice has grown up for important questions of foreign relations to be submitted to Parliament for formal approval. In 1927, the rupture of relations with Russia, and two years later, their renewal came up for discussion in Parliament.

Ambassadors.

War and peace.

Treaties.—Treaty-making power is vested in the Crown, and negotiations are carried on by its agents. While concluding a treaty, the Crown acts in its sovereign character, not as an agent or trustee for any subject. Therefore, it is not open to a subject to proceed against the Crown in order to compel it to distribute money received on his behalf under the terms of a treaty with a foreign state, even though there may be a moral duty on its part to distribute the money. The Chinese Emperor, under a treaty, paid to the Crown certain moneys on account of debts due from Chinese to British subjects trading with China. A British Indian creditor filed a Petition of Right to recover money due to him from a Chinese debtor. The petition was rejected. "We do not indeed," said Lord Coleridge, C.J., "doubt that, on the payment of the money by the Emperor of

The Crown acts as sovereign power.

China, there was a duty on the part of the English Sovereign to administer the money so received according to the stipulations of the treaty. But it was a duty to do justice to her subjects according to the advice of her responsible ministers; not the duty of an agent to a principal, or of a trustee to a *cestui que trust*. *If there has been a failure to perform that duty*, which we only suggest for the sake of argument, *it is one which Parliament can and will correct; not one with which the Courts of Law can deal*" (*a*).

In general, the Crown is the authorized representative of the nation for making treaties. But it cannot legislate, and it cannot tax without the consent of Parliament. The *Parlement Belge* was a Belgian ship which collided with an English vessel. The owners of the latter ship brought a suit for damages. In defence, it was pleaded that the other ship was the property of the King of the Belgians and in his possession, and was officered by officers of the Royal Belgian Navy. No doubt, it carried letters, merchandise and passengers for hire. But it was contended that, under a treaty between England and Belgium, the ship was a public ship, and therefore immune from the jurisdiction of the English Courts. However, there was no Parliamentary sanction for this treaty. The court decided in favour of the plaintiff, and held that such use of the treaty-making power of the Crown was "without precedent and in principle contrary to the laws of the constitution" (*b*), as the Crown acting alone could not alter the law of the land and deprive the subject of his usual remedy.

But it cannot legislate or tax by treaty.

Cession of Territory.—In strict Law, the Crown can cede territory without Parliamentary approval. But whenever an important cession of territory takes place, the Crown is careful to obtain such approval. In 1890,

(*a*) *Rustomjee* v. *Reg.* (1876), 2 Q.B.D. at p. 73.
(*b*) *The Parlement Belge* (1879), 4 P.D. at p. 154.
On appeal this decision was reversed on another ground, and it became unnecessary to say anything about the words quoted above. The rule laid down is good law.

the island of Heligoland was transferred to Germany with statutory assent (*c*).

Other Treaties.—Such sanction is also taken whenever a treaty affects private rights or alters the laws of trade or navigation, or provides for grants from public funds. Hence it was considered essential that the peace treaties which concluded the Great War of 1914—18 should be made binding upon the subject by Acts of Parliament. as these treaties involved the disposal of a great mass of private claims against former subjects.

Treaty of 1919.

The Courts.—The courts may enquire into all disputes arising out of treaties and other matters of state. A naval captain destroyed a lobster fishery belonging to a British subject, off the coast of Newfoundland. Under the terms of a treaty between England and France, this fishery had no right to exist. The owner of the fishery sued for trespass. In defence, the naval captain pleaded that he acted under orders lawfully given him by the Crown, the orders being necessary for the carrying out of a treaty which had been made in lawful exercise of the royal prerogative, that the courts could not enquire into matters of state, and finally, that the running of the fishery, being in contravention of a treaty was an unlawful act. The naval officer was held liable, because, without the authority of an Act of Parliament he had interfered with a subject's private rights. "The suggestion", said the Privy Council, "that these acts can be justified as acts of state, or that the Court was not competent to enquire into a

A treaty cannot curtail subject's rights without authority of Parliament.

(*c*) Anglo-German Agreement Act, 1890.

In an appeal from a decision of the Bombay High Court, the Privy Council held : "What was attempted was, in their Lordships' judgment, neither more nor less than a rearrangement of jurisdictions within British territory, by the exclusion of a certain district from the regulations and codes in force in the *Bombay Presidency*, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction under British supervision and control. But this could not be done without a legislative Act, which, in this case, was never passed." See *Damodhar Gordhan* v. *Deoram Kanji* (1876), 1 App. Cas. at p. 381.

matter involving the construction of treaties and other acts of State, is wholly untenable" (*d*).

But otherwise with foreigners' rights.

The decision would have been different if the injured party had been a foreigner and not a subject of the Crown. In that case it could have been validly maintained that the act was an act of state.

Acts of state.

Acts of State.—In the field of foreign affairs the authority of the Crown is absolute. While dealing with foreign states and their subjects outside the realm, the Crown has powers but no duties. An act done by a representative of the Crown, affecting the person or property of someone who is not a British subject is known as an act of state. Such an act may be previously sanctioned by the Crown, or subsequently ratified by it.

Not controlled by Courts.

"An act of State," it has been observed, "is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and whatever it may be, the municipal courts must accept it, as it is, without question" (*e*). As a rule, English courts assert a wide jurisdiction in respect of actions by government officials within the British dominions. But they do not at all apply municipal law to the actions of an agent of the Crown towards foreigners outside British territory. They will not enquire into an act of state.

Even a British subject cannot claim against the British government if his claim arises out of an act of state (*f*). Where the Government of India decided to annex an Indian state, which was not part of the dominions of the Crown, and in the course of the annexation property was seized and acts were committed, which

(*d*) *Walker* v. *Baird*, [1892] A.C. 491.

(*e*) *Per* Fletcher Moulton, L.J. in *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. at p. 639.

(*f*) *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. (C.H.) 613.

normally would have been regarded as torts, it was held that no action will lie in an English court (*g*).

A foreigner who is injured by an act of state cannot bring a suit in respect of such injuries. A British naval officer made a treaty with an African chief for the abolition of the slave trade, without the authority of the Crown. He was ordered to obtain the liberation of two British subjects detained as slaves. In pursuance of the treaty he fired sheds and enclosures belonging to the slave owner, a Spanish subject, carried away the slaves, and released them. The Crown adopted and ratified the action of the naval officer. It was held that by this ratification, the act of the defendant became an act of state for which he was irresponsible and therefore entitled to a verdict of "not guilty" (*h*).

A foreigner cannot sue for an act of state.

But an alien friend *residing within the realm* is, for this purpose, on the same footing as a British subject. A citizen of the United States of America was arrested in Ireland for illegal drilling of disaffected and disloyal persons. Some cash and a cheque found on his person were seized. It was held that he could apply to the courts for relief. "When a wrong" said Viscount Cave, "has been done by the King's officer to a British subject, the person wronged has no legal remedy against the Sovereign, for 'The King can do no wrong'; but he may sue the King's officer for the Tortious Act, and the latter cannot plead the authority of the Sovereign for 'from the maxim that the King cannot do a wrong it follows, as a necessary consequence, that the King cannot authorize wrong' . . . On the other hand, where the person injured is an alien resident abroad, the above rule does not apply; and if the act causing the injury is adopted by the Sovereign as an act of state, the alien is without redress except by diplomatic action taken through the Government of his own country . . . But there is a third case . . . namely,

But an alien friend residing within the realm can.

(*g*) *The Raja of Coorg* v. *East India Co.*, 7 Moore, Ind. App. 467, 531.

(*h*) *Buron* v. *Denman* (1848), 2 Exch. 167.

where the person aggrieved is an alien and *resident here;* and I think that it is the established law that such a case falls within the first and not within the second of the above categories . . . . . . Further an alien resident in this realm is entitled by statute to hold personal property here in the same manner in all respects as a natural-born British subject . . . . and it would be a serious derogation from that right if it were held that his property might be seized by an agent of the Crown without legal authority and without redress"(*i*).

No act of state between Sovereign and Subject.

As between the Sovereign and his subjects, there is no such thing as an act of state. The Sovereign's command is no excuse, unless the command is lawful in itself, "for the warrant of no man, not even of the King himself, can excuse the doing of an illegal act"(*j*). The courts determine whether a command is or is not lawful.

(*i*) *Johnstone* v. *Pedler*, [1921] 2 A.C. 262.
(*j*) *Sands* v. *Childs and others* (1693), 3 Lev. 352.

CHAPTER VI

FOREIGN AFFAIRS (CONTINUED)

Foreign Sovereigns.—The English Courts give full effect to the international law doctrine of the immunity of foreign sovereigns and diplomatic agents from legal process. This immunity in England rests on the common law. Early in the eighteenth century, the Russian envoy was arrested for a petty debt. The indignity was keenly resented by the Czar of Russia, who demanded that the wrong-doers should be executed. An Act was then passed which declared in clear terms the immunities of foreign diplomatic agents, accorded by the common law and by international practice (*a*).

Foreign sovereigns immune.

A foreign sovereign enjoys immunity from legal process. The Sultan of Johore, while visiting England offered marriage to an Englishwoman and was accepted. He was known to her only as Mr. Albert Baker. The Sultan subsequently changed his mind, and was sued for breach of promise of marriage. He then disclosed his real identity, and the court dismissed the suit for want of jurisdiction (*b*). But a foreign sovereign can be sued in an English court, if he voluntarily waives his privileges and submits to the jurisdiction of the court. However, the submission, in order to be effective, must be made at the time when the court is actually asked to exercise jurisdiction, and not before such time. "If therefore a sovereign having agreed to submit to jurisdiction refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court" (*c*).

(*a*) Diplomatic Privileges Act, 1708.
(*b*) *Mighell* v. *Sultan of Johore,* [1894] 1 Q.B. 149.
(*c*) *Duff Development Co.* v. *Kelantan Government,* [1924] A.C. 797.

The property of foreign sovereigns is similarly protected. On this point the case of The *Parlement Belge* has already been discussed, where it was held that the courts will not exercise jurisdiction over a ship which is the property of a foreign state, even if that ship is being run for commercial purposes.

Their property also.

It is for the Crown to recognize a foreign government or state. In case of any doubt or uncertainty, the courts seek information from a Secretary of State. This information cannot be questioned by the parties (*d*). However, in a dispute between the Crown and a private party over property, a minister's sworn statement is not accepted as final in favour of the Crown.

Crown recognizes foreign states.

Ambassadors.—A foreign ambassador or other diplomatic agent enjoys considerable immunities. For all judicial purposes, he is supposed to be living in his own country, and not in the country where he exercises his functions. He is exempt from civil and criminal jurisdiction. His person is inviolable. The protection extends to his family, suite, official residence, papers and mails.

If he violates the law, a diplomatic complaint may be made to his government, or in an extreme case he may be expelled. In one case alone, namely where he is engaged in acts which endanger the safety of the realm, he may possibly be arrested and sent out of the country and his house and papers may be searched.

International Law.—Normally, the English courts administer the rules of English law, not those of international law. During the Great War, a neutral ship *Zamora* belonging to Sweden was brought into an English port by a British cruiser to be searched. Part of her cargo was found to be copper, a metal of great importance to the parties at war. The War Office requisitioned the consignment for its own purposes

(*d*) *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797.

under an order-in-council. The Privy Council held that the prize courts existed in order to administer international law, and the Crown must not act upon its own views of this law but must accept it as interpreted by the Privy Council. "The idea," said Lord Parker, "that the King-in-Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of Law in this country is out of harmony with the principles of our Constitution. It is true that under a number of modern Statutes various branches of the Executive have power to make rules having the force of Statutes, but all such rules derive their validity from the Statute which creates this power and not from the executive body by which they are made" (*e*). A prize court is a municipal court, but administers international law. The former authoritative opinion was that as the prerogative of the Crown is uncontrolled in foreign affairs, the Crown could, by an order-in-council, lay down the rules to be applied in such a court. This view was definitely overruled in the present case. The Crown, it may therefore be said, cannot legislate by order-in-council, without the assent of Parliament, so as to alter the rules of international law to be enforced in the prize courts; and an order-in-council, like every other act of the prerogative is *sub lege*.

Prize courts administer international law.

The Crown cannot alter international law.

War and Peace.—The Crown alone has the right to declare war and peace. So strict is this rule, that even if the entire population were to start fighting against a foreign power without a declaration of war by the Crown, the legal status of all persons fighting would be the status of robbers or pirates, and not of belligerent forces.

Passports.—It is a prerogative of the Crown to issue passports to subjects for travelling in foreign countries. This right is exercised by the Foreign Secretary, who has an absolute discretion in the matter. No court interferes with this discretion.

Parliamentary Discussion.—For the most part, in matters relating to foreign affairs, there is urgent need

(*e*) The *Zamora*, [1916] 2 A.C. 77.

for secrecy. All governments are particularly sensitive to criticism in public. The Lords as well as the Commons generally accept without much enquiry the government's handling of external affairs. In this way, a great deal of ill-feeling in foreign countries is avoided. The House of Lords includes many men of ripe experience in the public service at home and abroad, and does not impose upon members rigid party ties, which may forbid free and frank discussion of government policy. It is therefore well fitted to discuss foreign affairs. The House of Commons, obviously, is ill suited for such a function. Party lines divide the House sharply, and party loyalty, as a rule, compels members to condemn the policy of a rival party. By common consent, diplomacy must be carried on in secrecy, and though the Foreign Secretary is theoretically responsible to the House of Commons just as other ministers are, there is comparatively little parliamentary scrutiny in his branch of the administration.

Parliament discusses foreign affairs very little.



CHAPTER VII

THE PRIVY COUNCIL

Origin and Composition.--In its origin, the Privy Council was the chief advisory council of the Crown, consisting of men of rank and distinction in different spheres of life. Great prestige has attached to this ancient body. For this reason, its numbers went on increasing till it could hardly perform the function of advising properly. In consequence it was broken up into committees. Its functions today are of a formal character, essential power being in the hands of the cabinet. The Privy Council now consists of over three hundred members, of whom one is a lady, a former minister of the Crown. It includes all cabinet ministers past and present, the Prince of Wales (when there is one), the Royal Dukes, the Archbishops, the Bishop of London, the Speaker of the House of Commons, the Viceroy of India, the Lords of Appeal, the Lord Chief Justice and others, also, a few members from India. Members must be British subjects. But apart from this, no previous qualification is legally necessary.

Members.

Appointment.—The appointment of members is made by a declaration of the King-in-Council, which is entered on the records of the council. Tenure can be terminated in the same manner. Certain offices have acquired a constitutional claim to a seat in the Privy Council. Thus, a cabinet minister is always appointed a member. The King's sons are Privy Councillors by birth. They do not take the oath of allegiance or the oath of fidelity and secrecy as other members do. Privy Councillors have the powers of a justice of the peace (*a*) all over the country. They do not get any salary or emoluments, but are styled "Right Honourable." They are pledged to secrecy. The pledge is

Appointed by King-in-Council.

No salary.

Secrecy.

(*a*) Officer analogous to a Magistrate.

superfluous except in the case of a few members, because the rest are never summoned to meetings. Those who are summoned have not always observed the pledge scrupulously. In 1930, when Mr. Winston Churchill quoted in the Commons a cabinet memorandum regarding naval armaments, his conduct was censured in many quarters. Privy Councillors may attend the debates of the Lords. This is a relic of ancient times when Parliament was a meeting of the King's Council with the barons, clergy, and the commons.

Meetings.—The council as a whole meets only on one occasion, namely on the death of the Sovereign, to proclaim his successor. Apart from this one solemn occasion, when all members are summoned, ordinary meetings take place quite frequently for the passing of orders-in-council and proclamations. Both documents embody the more important decisions of the executive, but a proclamation is issued when greater publicity is desired, as for the purpose of summoning or dissolving Parliament.

The King presides.

The council can meet at any place where the King may be. He presides in person. The summonses are issued by the clerk of the council only to a few members, usually six, mostly cabinet ministers, sometimes one of the sons of the King. No member has a right to be summoned. The quorum is three councillors.

Only formal business.

The business transacted is of the most formal kind. The orders are already prepared by the minister whose department they concern. If they relate to important matters, they must have been considered by the cabinet. In the council no discussion is possible. It is not a deliberative body. It meets solely to give formal sanction to measure planned by ministers. Their nature is explained to the King, who says "approved". The Lord President of the Council (himself a member of the cabinet) must satisfy himself that all matters laid before the King-in-Council rest upon the authority of a cabinet minister. The advantage of formal meetings of this sort is that with regard to each order-in-council several members of the cabinet must necessarily be committed, if not legally, at least, constitutionally.

Orders-in-Council.—The council no longer has any deliberative and consultative functions. But its field of action is immense. Its orders and regulations touch minute details of administration including the lighting and ventilation of cowsheds(*b*). On other occasions they legislate for colonies and dependencies. Orders of the Privy Council are of two kinds. *Firstly*, there are those which are made in exercise of the prerogative, independent of the law-making power of Parliament. Included in this class are legislative orders for the Crown colonies, and regulations for trade and commerce in time of war. During the Great War, the celebrated Reprisals Order of 16th February 1917 authorised the capture of vessels proceeding to neutral ports which afforded access to enemy territory, and thus virtually imposed the economic blockade on Germany. It has been held that an order-in-council like every other act of the prerogative is subject to the review by the courts, and cannot, of its own motion, override the ordinary law of the land(*c*). But apart from this reservation, the courts give the utmost weight to such an order. All acts of the prerogative are in effect acts of the cabinet. So, accordingly, are orders-in-council, whether they are concerned with questions of the general policy of the realm or of policy affecting only a particular department.

Under prerogative.

Secondly, there is a very large and growing class of orders-in-council issued under the authority of Acts of Parliament. The statute lays down the principle and leaves it to the Council to prescribe details. This body is ill-suited for the task, consisting, as it does, of the Sovereign and a few Privy Councillors summoned by the Lord President. But what it does in reality is to give formal sanction to legislation by government departments. The sanction of the council is as formal as the royal assent to Bills passed by the Houses of Parliament. The fact is that the procedure employed for orders-in-

Under statute.

In effect, legislation by the executive.

(*b*) Contagious Diseases (Animals) Act, 1878, s. 34.
(*c*) *The Zamora*, [1916] 2 A.C. 77.

council is a convenient constitutional disguise for *legislation by the executive*.

Committees.—The Council serves as a panel for the composition of committees. The Board of Trade is technically one such committee. In fact it is only a name for a government department. It never actually meets. The Cabinet is another committee. This really assembles for purposes of discussion, but it is a matter of doubtful propriety to call the Cabinet a committee of the Privy Council. The Judicial Committee consists exclusively of judges. It is the Supreme Court of Appeal for the British Empire outside the United Kingdom. It also hears appeals from the ecclesiastical and prize courts within the United Kingdom.

CHAPTER VIII

THE CABINET ORIGIN AND GROWTH

Cabinet.

Creature of convention.

Yet most important body.

The Real Executive.—The real executive in England is the Cabinet. This is a group of ministers belonging, in normal circumstances, to one political party (*a*). All of them have seats in Parliament and are dependent on the favour of the Commons (*b*). They jointly decide, under the leadership of the Prime Minister, the policy of the executive and the legislation to be introduced by the government in Parliament. They are responsible for one another's action and for the government of the country as a whole. The Cabinet has no legal status(*c*). It is a creature of convention, unknown to the law. Its functions, powers, and obligations have never been laid down by any authority. No statute or official document ever refers to it. The practice corresponds to no theory of the constitution. Yet the Cabinet is the most characteristic and important institution of government in England. "It is perhaps the most curious

(*a*) The cabinet system essentially rests on party. A political party aspires to put in power a group of leaders of its own mode of thinking, which will carry out a policy in general accord with the views of the party. Only on rare occasions, have coalition cabinets been formed in England. Such cabinets have been proverbially unpopular. "England", said Disraeli, "does not love coalitions". The government formed in 1931, consisting of members of three political parties was careful to describe itself as a National Government.

(*b*) The House of Commons possesses the practical power to dismiss cabinets, because it can make public expenditure impossible, or render the forces of the Crown impotent by refusing to pass the budget or the annual Army Act.

(*c*) "The Cabinet is not a legal entity, and Cabinet rank is not due to an office. A member of the Cabinet, as such, has no office. He is invited to attend by a purely informal note from the Prime Minister. For the Cabinet is merely a private meeting of the more important ministers. It is however the rule that Cabinet ministers should be sworn of the Council so as to apply to them the Privy Councillors' oath."—Ivor Jenning, *Cabinet Government*, p. 63.

formation," said Gladstone, "in the political world of modern times, not for its dignity, but for its subtlety, its elasticity, and its many-sided diversity of power . . . . It lives and acts simply by understanding, without a single line of written law or constitution to determine its relations to the Monarch, or to the Parliament, or to the nation ; or the relations of its members to one another, or to their head" (*d*).

Origin and Development.—Its origin may be traced to the seventeenth century, when Charles II began to summon a few important members of the Privy Council, instead of the whole body, for consultation. At the Revolution of 1688, the King's power was definitely subordinated to Parliament. There was general eagerness to control the King in his historical right and duty of directing policy and administration, and this eagerness increased all the more, when, after the Revolution, the King to be controlled was a Dutchman. Prerogative rule had been arbitrary no doubt, but it offered an instrument of executive government. The Revolution removed it, but provided no obvious substitute. A Parliament can legislate, it can discuss and criticise, but it is far too unwieldy a body to govern. The problem was to create a body, small enough and independent enough to take energetic action, yet sensitive to a certain extent, to the echoes of popular opinion as expressed in Parliament.

Revolution of 1688.

Under William III, there grew up a circle of real councillors within the wider circle of nominal councillors for purposes of his wars against France. Money was required for these wars, and the co-operation of Parliament was obviously of prime importance. The only safe way to get it was to employ ministers who could command steadily a majority in the House of Commons. The inner council gradually came to be known as the

(*d*) *Gleanings from the Past*, 1, p. 224 *seq.*
So also Maitland : "The truth that the Cabinet is unknown to law must not be converted into the falsehood that it is a meeting of persons who have no legal powers. Each cabinet minister is a Privy Councillor, each is a high officer, each has usually large legal powers. But the legal powers of a cabinet meeting are only the sum of the legal powers of its members. The cabinet has no corporate powers."—*Constitutional History of England*, p. 402.

cabinet council—the council held in the King's own cabinet or private room, though legally, its meetings were meetings of the Privy Council. In Queen Anne's reign, the Duke of Marlborough kept in his hand all military and diplomatic affairs, but left to his colleagues the management of Parliament.

Walpole.

Walpole.—It was under Robert Walpole (Minister from 1721—42), that the principle of the common responsibility of the Cabinet grew up, and the Prime Minister came to be recognized as the leading man in the cabinet and in the Commons. The process was favoured by accidental circumstances. George I was a Hanoverian, ignorant of the English language and customs, and felt little concern about the internal policy of the country. He did not attend the cabinet, which now began to meet without the King's presence. Only its decisions were conveyed to him by a minister. If an order-in-council was wanted, a formal meeting of the Privy Council was held, under the King's presidency, to register a conclusion already debated in the cabinet and communicated to the King. The Sovereign has not attended a cabinet meeting for over two hundred years, and the old practice of his presiding over such meetings is now obsolete.

Common responsibility.

The sovereign does not attend.

The Modern Cabinet.—Walpole freely drove out from his Cabinet colleagues who could not agree with his policy or would not accept his leadership, and in doing this he set up a system of government which has survived to this day. The Cabinet is the key to efficient administration in England by a responsible and united executive, subject to the will of a large debating assembly. The ministers are not excluded from the Commons. On the contrary, most of them sit in, and lead the House. Between the executive and the legislature the cabinet works as a close connecting link. It is the essential part of the modern constitutional machinery. The English are better politicians than political theorists; and solely in the endeavour to meet the country's needs

The Cabinet acts subject to the Commons.

in peace and in war, the cabinet system was evolved, whereby a number of men, in name the servants of the King, in fact the dependants of Parliament, were invested with power, limited no doubt, but sufficient to carry on the administration of the country. By the end of the Napoleonic era, we find the principles of political unanimity and collective responsibility firmly established, and this instrument of government fully forged. The cabinet is England's most characteristic contribution to political institutions.

CHAPTER IX

THE CABINET AND ITS WORKING

Prime Characteristics.—"The principal features," wrote Lord Morley (*a*), "of our system of Cabinet government today are four. The *first* is the doctrine of *collective responsibility*. Each Cabinet Minister carries on the work of a particular department, and for that department he is individually answerable . . . . In addition to this individual responsibility, each Minister shares a collective responsibility with all other members of the Government for anything of high importance that is done in every other branch of the public business besides his own . . . .

Lord Morley's description

"The *second* mark is that the Cabinet is *answerable immediately to the majority of the House of Commons*, and ultimately to the electors whose will creates that majority . . . .

"*Thirdly*, the Cabinet is, except under uncommon, peculiar and transitory circumstances, *selected exclusively from one party* . . . .

"*Fourth, the Prime Minister is the keystone of the Cabinet arch.* Although in Cabinet all its members stand on an equal footing, speak with equal voice, and, on the rare occasions (*b*), on which a division is taken, are counted on the fraternal principle of one man, one vote, yet the head of the Cabinet is *primus inter pares* (first among equals), and occupies a position which, so long as it lasts, is one of exceptional and peculiar authority. It is true that he is in form chosen by the Crown, but in

(*a*) *Walpole*, first published in 1889, at p. 154 of the 1913 edition.

(*b*) "In a Cabinet, at least the one single Cabinet that I know anything about, there are never votes in the ordinary sense. The Prime Minister, like the clerk of a Quaker's meeting, takes what he considers is the conclusion, and men who disagree have the choice of either acquiescing or resigning from the Cabinet"—
Mr. George Lansbury, in the House of Commons, September 14, 1931.

practice the choice of the Crown is pretty strictly confined to the man who is designated by the acclamation of a party majority"(*c*).

Acts as a unit.

"In essence", says Bagehot, the Cabinet is "a combining committee—a *hyphen* which joins, a buckle which fastens, the legislative part of the State to the executive part of the State" (*d*). It acts as a unit towards the Crown, and stands or falls as a unit in Parliament. "I don't care", declared Lord Melbourne in the last century, "what we say, but we'd better all say the same thing." When in 1922 the late Mr. Montague, Secretary of State for India, published, *on his own authority*, a protest from the Government of India against the peace treaty with Turkey, there was no option for him but to resign. But in 1932, a few Cabinet Ministers and some other ministers who were not members of the cabinet spoke and voted in Parliament against the Tariff Bill introduced by the government of which they were members, and yet retained their offices. It was a strange device of an "agreement to differ." It was understood at the time of their appointment that they were opposed in principle to protection. It was considered more convenient to allow them to differ from other colleagues even in public than to have a reconstruction of the government. The conventions which regulate the cabinet are based on convenience, and were suspended for the sake of a still greater convenience.

Exceptions to this rule.

Meets in secret.

Lastly, it may be noted that the Cabinet meets in secret. Apart from members, the only person present at its discussions is its secretary. Even the King may not enquire into the lines of division among his ministers. Secrecy is essential. Publicity would only cause a smaller and still more

(*c*) Mr. Winston Churchill, writing about his father has said: "He became Leader of the House of Commons, not because he had schemed for it, nor because it was his right in lawful succession, not assuredly because the Conservatives loved him or felt that they would be safe in his hands. He *was* the leader at the moment—natural, inevitable and, as it seemed, indispensable"—*Life of Lord Randolph Churchill*, p. 530.

(*d*) *The English Constitution*, Worlds Classics edition, p. 12.

informal body to replace the cabinet, just as the cabinet replaced the Privy Council as the organ for discussion of national policy. Secrecy, unity of outlook, collective responsibility to the Sovereign and to the majority party in the Commons, and the supremacy of the Prime Minister ..... these are the primary marks of the modern cabinet.

The Prime Minister.—In theory, and in theory alone, the Cabinet is a committee of the Privy Council. Hence Cabinet Ministers are invariably appointed Privy Councillors, before they enter the Cabinet. But apart from this, its composition and functions are determined by the Prime Minister. He is the pivot of the Cabinet. During the Great War, in 1916, Mr. Lloyd George, then Prime Minister, formed a cabinet of only five members. Later he took General Smuts of South Africa as a sixth member (*e*). After the war there was a reversion to normal practice. But the outstanding fact about cabinet government is the supremacy of the Prime Minister.

Prime Minister, pivot of the Cabinet.

So long as he commands a majority in the House of Commons, he exercises *de facto* absolutism in all legislative and executive matters. But curiously, the existence of this officer never received any official recognition until 1878, when for the first time, in certain documents relating to the Treaty of Berlin, the Prime Minister was formally mentioned. Subsequently, his precedence has been fixed immediately after the Archbishop of York, and the title now frequently appears in official documents. Till recently, his office was without emoluments (*f*). The

de facto absolutism.

(*e*) The law does not insist that a member of the Cabinet must be a member of Parliament or that he should hold any ministerial post, though this is required by convention.

(*f*) "The Prime Minister has no salary as Prime Minister. He has no statutory duties as Prime Minister, his name occurs in no Acts of Parliament, and though holding the most important place in the constitutional hierarchy, he has no place which is recognized by the laws of his country. That is a strange paradox"—*Per* Lord Balfour, in a speech in 1904, quoted in Low's *Governance of England*, p. 153.

"Nowhere in the wide world, does so great a substance cast so small a shadow; nowhere is there a man who has so much power,

Prime Minister usually becomes First Lord of the Treasury, which office has always carried a salary but which has no departmental duties.

Determines cabinet's composition.

He becomes Prime Minister by accepting the King's invitation to form a ministry. He exercises immense authority. He personally invites other politicians to accept places under him. He determines the number of ministers, and the departments to which they are to be assigned. He decides how many ministers are to be included in the Cabinet. By convention he has the power to ask for the resignation of any colleague at any time. He presides at Cabinet meetings, and he largely decides its agenda. He co-ordinates policy, and works as a court of appeal between colleagues in conflict. He determines for the most part the order and character of legislative business. It is at his instance that honours are conferred by the Crown.

Can demand resignations.

Honours.

Intermediary between King and Cabinet.

He is the channel for communication between the King and the Cabinet, though individual ministers have the right of access to him on matters connected with their own departments. "He reports to the Sovereign," says an eminent authority (*g*), "its proceedings, and he also has many audiences of the august occupant of the Throne. He is bound, in these reports and audiences, not to counterwork the Cabinet; not to divide it, not to undermine the influence of any of his colleagues in the Royal favour. . . . As the Cabinet stands between the Sovereign and the Parliament, and is bound to be loyal to both, so he stands between his colleagues and the Sovereign and is bound to be loyal to both."

with so little to show for it in the way of formal title or prerogative —Gladstone, *Gleanings* I, p. 244.

Under the Ministers of the Crown Act, 1937, the Prime Minister and First Lord of the Treasury gets a salary of £10,000 per year and on retirement an annual pension of £2,000.

(*g*) Gladstone, *Gleanings* I, p. 243.

He alone has the power to ask the King to dissolve Parliament. In 1874, Gladstone obtained permission from the Crown to dissolve Parliament without any previous consultation with his colleagues. In 1924, Mr. Ramsay MacDonald did the same. Up to 1902, a peer could be Prime Minister. In 1923, the King, acting on the advice of all living ex-Prime Ministers preferred Mr. Baldwin to Lord Curzon. We may take it that the convention is now established that the Prime Minister must be a member of the House of Commons. It is there that essential discussion takes place, and if the Prime Minister cannot personally lead that House, he will find it hard to maintain his authority in the Cabinet.

King dissolves Parliament at his request.

Must sit in the Commons.

Comparison with U. S. A. President.—The framers of the United States constitution were dominated by the doctrine of the separation of powers, which was supposed to be a characteristic feature of the English constitution. The President is elected for a fixed period and is practically irremovable while his term of office lasts. His ministers, however able, have no independent political status, and may be men with no parliamentary experience. Indeed during their term of office, the law precludes them from obtaining such experience. The Cabinet arrangements are radically different. "The head of the administration (though he has no statutory position), is selected for the place on the ground that he is the statesman best qualified to secure a majority in the House of Commons. He retains it only so long as that support is forthcoming. He is the head of his Party. He must be a member of one or other of the two Houses of Parliament; and he must be competent to 'lead' the House to which he belongs. While the Cabinet Ministers of a President are merely his officials, the Prime Minister is *primus inter pares* in a Cabinet of which (according to peacetime practice) every member must, like himself, have had some

Must command a majority in the Commons.

Must have parliamentary reputation.

parliamentary experience, and gained some parliamentary reputation.

"The President's powers are defined by the Constitution, and for their exercise (within the law) he is responsible to no man. The Prime Minister and his Cabinet, on the other hand, are restrained by no written constitution ; but they are faced by critics and rivals whose position, though entirely unofficial, is as 'constitutional' as their own ; they are subject to a perpetual stream of unfriendly questions to which they must make public reply ; and they may at any moment be dismissed from power by a hostile vote" (*h*).

May be dismissed by hostile vote.

Unlike the Prime Minister, the President cannot dissolve the legislature. If Congress is hostile he cannot successfully initiate any large policy, because he cannot influence legislation or taxation so necessary for initiating a new policy. The Prime Minister is, on the other hand, essentially, part of a co-operative system. He, his government and the House of Commons must co-operate, or the government must resign.

Composition of the Cabinet.—The average Cabinet in recent times has consisted of about twenty members. Up to the middle of the last century, the majority of its members were peers. In the present century, as a rule, there have not been more than three or four peers in the cabinet. It consists of the heads of the great departments (*i*) and two or three ministers who have no onerous departmental functions like the Lord President of the Council and the Lord Privy Seal. On rare occasions, the Attorney-General has been a member of the Cabinet. But as his functions are quasi-judicial, this arrangement has never found favour with constitutional lawyers. There has been, in modern times, some tendency to have an

(*h*) Balfour's Introduction to Bagehot, *The English Constitution*, pp. viii-ix.

(*i*) No minister can claim a right to be included in the cabinet. But a convention exists in favour of the following :—the Lord Chancellor, the Chancellor of the Exchequer, the eight Secretaries of State, the Ministers of Health, Education, Labour, etc. Other ministers while not members of the cabinet are members of the government.

inner cabinet consisting of the more influential members of the Cabinet (*j*).

Control of Legislation.—The House of Commons, in recent years has been greatly pressed for time, and the progress of private members' Bills can be impeded in a variety of ways. Government has therefore come to enjoy a virtual monopoly of parliamentary time. So effective is this monopoly, that today it is impossible for a Bill to pass unless the government propose it or give special facilities for its passage in the Commons.

Salaries.—A Cabinet Minister until recently got no salary as a Cabinet Minister, but only as an official of the Crown (*k*). But there are now-a-days in the Cabinet one or two "ministers without portfolio"—a contradiction in terms—who have no departmental duties but receive a salary for their services in the cabinet.

Secretariat.—Until 1917 the Cabinet had no secretariat and no archives, as these were considered to be inconsistent with secrecy. But in that year, on account of the immense growth of business, a secretariat was set up in order to keep a strict record of the decisions taken. Occasional protests have been raised against this innovation. But on account of its great utility, it may now be regarded as an established institution (*l*). Cabinet

A useful innovation.

(*j*) Referring to the military conversations of 1906 between Great Britain and France, Lord Haldane says: "As these preliminary arrangements were initiated while Ministers were away on their Election campaigns, there could be no Cabinet discussion of them. But the Prime Minister, Lord Ripon as leader in the Lords, and Asquith had full knowledge of them"—*Autobiography*, p. 191.

In most Governments, there are four or five outstanding figures who by exceptional talent, experience, and personality, constitute the inner council which gives direction to the policy of a ministry. An administration that is not fortunate enough to possess such a group may pull through without mishap in tranquil season, but in an emergency it is hopelessly lost"—Lloyd George, *War Memoirs*, Vol. III, p. 1042.

(*k*) The Ministers of the Crown Act, 1937, now provides for the salaries of cabinet ministers.

(*l*) Speaking of the Cabinet of 1906, Lord Haldane says: "We had no Secretary, no agenda, and no minutes in those days . . . . Ramsay MacDonald managed the Cabinet to which I belonged in 1924 more effectively. But then he had Sir Maurice Hankey as Secretary, with an agenda paper and carefully drawn minutes in which the decisions were recorded"—*Autobiography*, pp. 216-217.

proceedings are secret, and the rule is strictly observed that the Cabinet minutes of one government cannot be made available for the use of a subsequent government. The draft minutes of the Cabinet, after approval by the Prime Minister, are sent to the King.

Executive Government.—The King is the head of the executive. Apart from statutory authority, all executive acts are done by his servants in his name. But in fact, the King takes no part in the executive government of the country. His ministers act for him, in most cases, without actual reference to him. If the King's personal authority is necessary, as in the dissolution of Parliament, he must act upon the advice of his ministers. The ministers are responsible to Parliament for the advice they give to him. The fullest information is supplied to the Sovereign. Drafts for his approval and signature must be submitted in time to permit of adequate consideration. The King can always reprimand a minister who fails in respect or in duty. But in all political matters he must follow the advice of the Cabinet. Ministers have a constitutional right to tender such advice to the Sovereign as they deem fit, and it is unconstitutional for him to limit the scope or character of that advice by threats of dismissal or otherwise. The ministers are jointly and severally responsible to Parliament for every legislative and executive act of the Crown. In fact. it has no power to do any public act except through a minister who will be held responsible for the act. This responsibility may be enforced in the last resort, by impeachment, and it is not open to a minister to plead the orders of the Crown by way of defence. Also, ministers are, in effect, dismissible by the House of Commons if they cease to enjoy its support. In fact, unless the wrong act of a minister is disowned, the entire government may forfeit the confidence of the House. Lord Morley (*m*) spoke of a "Chancellor of the Exchequer . . . . driven from office by a bad dispatch from the Foreign Office." In 1924, Mr. Ramsay

Ministers act for the King.

The King must act through his ministers.

(*m*) *Walpole*, p. 155.

MacDonald's government was forced out of office by the fact that the Commons disapproved of the Attorney-General's conduct in the matter of a journalist accused of sedition. The House insisted upon censure or enquiry, and the government acted as a unit and resigned.

The Commons may compel ministers to resign.

CHAPTER X

CABINET COMMITTEES

Committees.—The cabinet is assisted by standing committees and *ad hoc* committees. But particulars relating to such committees are never published.

Committee of Imperial Defence.—Strictly speaking, the Committee of Imperial Defence is not a committee of the cabinet. It was created in 1902 by Lord Balfour, then Prime Minister, in order to co-ordinate defence policy. It is purely an advisory body, with no executive functions at all. Its deliberations are secret, and its constitution elastic. The one essential member is the Prime Minister, who summons other ministers and advisers, keeping in mind the subjects to be discussed. Normally, the heads of the defence departments, political and technical, attend its meetings. The committee does not deal with the details of departmental administration but only with broad questions of defence policy. It has a secretary and four assistant secretaries who are officers of the army, navy, air force and Indian army. The committee keeps a record of its proceedings.

Economic Advisory Council.—The Economic Advisory Council was formed in 1930 by Mr. Ramsay MacDonald's government. It has no executive functions, but reports to the cabinet upon economic matters. It studies developments in trade and industry at home and abroad which may have a bearing on the prosperity of the country, and advises how national and imperial resources could be utilized to the fullest advantage, and suggests new lines of fiscal policy. The chairman of the council is the Prime Minister. Other members are the Chancellor of the Exchequer, the President of the Board of Trade, the Minister of Agriculture and Fisheries and certain other ministers and persons specially chosen by the Prime Minister. For the most part the council works through committees.

Home Affairs Committee.—The Home Affairs Committee examines carefully the legal implications of Bills to be introduced in Parliament by the Government.

The cabinet also appoints *ad hoc* committees from among its own members.

CHAPTER XI

THE MINISTRY AND GOVERNMENT DEPARTMENTS

The Ministry.—Immediately on appointment, as soon as he has kissed the King's hands, the first task of the Prime Minister is to select persons from among his supporters to be appointed by the King to the great executive offices of state. These persons collectively are known as the ministry. It is out of this body that the Prime Minister forms a smaller and more important group called the Cabinet, who are at the helm of affairs in the realm.

Cabinet selected from ministry.

Each great department of state has a political head, appointed by the Crown on the advice of the Prime Minister. It is manned by the permanent civil service, who continue their work whatever party may be in power. But the political chiefs of department, or ministers change with every change of government. At any time, the Prime Minister can ask for the resignation of any one of them, and in case of refusal, he can ask the Crown to dismiss him. Included in the ministry are parliamentary secretaries or under-secretaries attached to the more important departments. They are appointed with the approval of the Prime Minister, and hold office on the same terms as their departmental chiefs. They stand or fall with the Cabinet.

Conditions of Service.—Ministers hold their posts under the prerogative power of the Crown or by statute, and not merely by usage as is the case with the Prime Minister. In practice, Cabinet Ministers and the various parliamentary secretaries and under-secretaries must have a seat in Parliament, though the law does not lay down this requirement. Ministers are servants of the Crown and may be dismissed at any time by the King on the advice of the Prime Minister. The doctrine

Ministers accountable to Parliament.

of ministerial responsibility makes every minister accountable to Parliament for every act done by him or by his subordinates in the name of the Crown. The usual procedure for expressing dissatisfaction with a minister is to bring a motion for reducing his salary, sometimes by a nominal figure only. In extreme cases, the Commons may impeach a minister before the Lords. However, there has been no case of impeachment since 1805. This old weapon has been replaced by modern forms of parliamentary control. For instance, a vote of censure on an individual minister is usually regarded as a vote of censure on all his colleagues, and leads to the resignation of the entire government.

Salaries.—Parliament votes the salaries of all ministers annually except that of the Lord Chancellor. The Crown can create a new office or a department, but any remuneration for such purposes must be sanctioned by Parliament. The invariable practice, therefore, is to constitute new ministries under statutory authority, as in the case of the Minister of Labour, the Secretary of State for the Air, the Minister for Health and the Minister for Transport.

Several Secretaries of State, but in theory only one office.

Secretary of State.—From early times, the King's Secretary was the medium for issuing the King's orders to the subject and for forwarding the subjects' communications to the Sovereign. He naturally came to be regarded as an executive official of great importance, and in course of time came to be known as Secretary of State. With the growth of business, his duties have been divided between a number of Secretaries of State, of whom there are at present eight. However, as a matter of theory, there is only one office. Frequently, statutes confer powers upon 'a' Secretary of State, without specifying any particular Secretary of State. Such powers may be exercised by any Secretary of State, whether they relate to his department or not. Even apart from such statutory powers the normal practice is that all Secretaries of State can exercise the functions of any of the rest, which is convenient when any one of them is ill or absent for some other reason. All

commissions, proclamations, and other state documents issued by the Crown must be countersigned by some Secretary of State. But a Secretary of State must always be distinguished from a mere secretary who is not 'of State'. Such a secretary cannot exercise the powers of a Secretary of State.

The Lord Chancellor.—The Lord High Chancellor of Great Britain occupies an office, ancient as well as dignified. He holds rank and precedence next to the Archbishop of Canterbury. In many ways his position is unique. He is the chief legal adviser of the government.

Speaker of the Lords.

He is the Speaker of the House of Lords in its legislative capacity. He presides over the Lords when sitting as the supreme court of appeal, and over the Judicial Committee of the Privy Council as the final court of appeal for the British Empire outside the United Kingdom.

Highest judge.

He is the custodian of the Great Seal.

Great Seal.

Directly or indirectly, he controls the entire judicial machinery of the realm through his patronage and administrative powers conferred by the Judicature Act, 1925, and other Acts. The Crown appoints the Lord Chief Justice on the recommendation of the Prime Minister, but all other judges of the High Court are appointed on the advice of the Lord Chancellor. He appoints all county court judges, and can dismiss them. He controls the officials of the High Court. He exercises extensive patronage in the Church of England. Certain departmental functions attach to him, and his duties are to a large extent administrative. Also a body of permanent officials work under him. But the Lord Chancellor does not constitute a department. Though the highest judge in the country, his office is a political one. Invariably the Lord Chancellor is a Cabinet Minister and the spokesman for the government in the House of Lords.

Always a member of the Cabinet.

He is selected from among eminent members of the bench or bar belonging to the political party in office. He gets the highest salary (£10,000 free of taxes) among all the public servants in the country.

The Treasury.—While the Lord Chancellor enjoys, after the Prime Minister, the highest status among ministers, the Treasury has the highest status among all departments. In theory, it is a board. Its members are the First Lord of the Treasury, the Chancellor of the Exchequer, and four or five Junior Lords of the Treasury, who are styled as 'their lordships' in correspondence. The board never meets. The First Lord is usually the Prime Minister and has no departmental duties. The Junior Lords act as Government 'whips' in Parliament. They have "to make a House, to keep a House, and to cheer the Minister" as Canning put it. They organize the party affairs of the government, and must see that an adequate majority is present in the House of Commons to support government measures. Their functions are purely political.

The Chancellor of the Exchequer is the Finance Minister, the working head of the Treasury. He invariably has a seat in the cabinet and in the House of Commons. He introduces the 'Budget' and other financial measures. Directly and indirectly finance enters into every affair of state, and while the Treasury performs its primary duties as one department, its essential function is to control finance in every department and to secure economy in the expenditure of public money. Its code of regulations can be disregarded only with its leave or by order of the cabinet. No estimates can be presented to Parliament without its authority. Throughout the year it discusses with the spending departments their requirements, and is always considering plans to guard against waste and extravagance. In theory it is for Parliament to criticize and control expenditure. In practice it is the Treasury, and not the House of Commons, which is the principal obstacle a department has to face when it wants to spend money, though the Treasury control breaks down when a politically attractive scheme is presented. Through its power of regulating the collection and expenditure of the public revenue, it controls practically every branch of the administration, and exercises vigilance over the taxpayers' interests. It is the paymaster

The Treasury controls expenditure in all departments.

for all government officials, and acts as a check on the civil service establishment.

The Financial Secretary is the Chancellor's principal lieutenant and his deputy in the Commons. He is not a member of the Board, but in effect enjoys the status of a minister.

Departments under Secretaries of State.—The Home Secretary has precedence over other Secretaries of State.

Home Office.

His duties are most miscellaneous. He deals with factories, prisons, police, pardons, aliens, naturalization, extradition, etc. "The Home Office", says Lowell, "is a kind of residuary legatee" (*a*), because it deals with all matters which are not assigned to any particular department. The Home Secretary is the medium of communication between the Crown and the subject, and between the Sovereign and the Church. He appoints magistrates, and is responsible for the maintenance of public order.

The Secretary of State for Foreign Affairs conducts the foreign policy of the country and is responsible for

Foreign Office.

it to the Crown and to Parliament. But in view of the need for secrecy in the handling of foreign affairs, parliamentary control over him is less strict than in the case of other departments. He corresponds with foreign governments and with the representatives of His Majesty's Government in foreign countries. He is in charge of the diplomatic and consular services, which attend to private and public interests in foreign countries.

The Dominions Office deals with the relations of

Dominions Office.

Great Britain and the self-governing Dominions and Southern Rhodesia. The Secretary of State has a permanent and a parliamentary under-secretary.

The Colonial Office deals with colonies and dependencies, the extent of its control depending upon the

Colonial Office.

form of government prevailing in a particular area. It has no control over the Dominions, India and Burma. The

(*a*) *Government of England* I, p. 105.

Secretary of State has a permanent and a parliamentary under-secretary, and is responsible for a large volume of colonial legislation by orders-in-council.

War Office.

The War Office, in its present form, dates from the year 1904. It controls the land forces of the Crown. The Secretary of State presides over the Army Council which includes seven other members, military and civilian. The permament under-secretary acts as secretary to this council, which is charged with the organization of the defence of His Majesty's dominions. The Secretary of State is responsible to the Crown and to Parliament for all decisions taken by the Army Council.

India Office.

The India Office deals with matters relating to the government of India and of Burma. The Secretary of State issues instructions and directions to the Governor-General of India and the Governor of Burma. He receives advice from a body of advisers appointed by him for that purpose from amongst persons with a prolonged experience of Indian affairs. There is a permanent and a parliamentary under-secretary.

Scottish Office.

The Scottish Office is responsible for the internal government of Scotland.

Air ministry.

The Air Ministry has an Air Council modelled on similar lines to the Army Council. It deals with the organization of the Air Force, defence by air and air navigation. The council is presided over by the Secretary of State for Air, who is responsible to the Crown and to Parliament for all decisions of the Air Council.

Co-ordination of Defence.

In 1936 the office of Minister for the co-ordination of Defence was created. This minister acts as Deputy Chairman of the Committee of Imperial Defence, and undertakes day to day supervision and control on behalf of the Prime Minister, over the entire activity of the Committee of Imperial Defence. He co-ordinates the executive action of the various defence departments, and makes monthly reports to the Cabinet on the execution of plans for reconditioning armaments.

Departments under Other Ministers.—The Admiralty administers the affairs of the Royal Navy. The Board of Admiralty consists of the First Lord of the Admiralty (the political head), several Sea Lords who are professional sailors, a Civil Lord, Parliamentary and Financial Secretaries and a Permanent Secretary. The First Lord is responsible to the Crown and Parliament for all decisions of his department. He is not a Secretary of State, as are the chiefs of the War Office and the Air Department.

Admiralty.

The Board of Trade is, in theory, a committee of the Privy Council, and curiously enough includes the Archbishop of Canterbury. The Board never meets. Its president is the working head of the department. It supervises all national industries, including the mines and mercantile marine of the country. It deals with the administrative (not the judicial) side of proceedings relating to patents, bankruptcy, and the winding up of companies. It regulates weights and measures. It looks after lighthouses through an old corporation known as Trinity House. Through these and other matters the Board is in daily touch with the commercial life of the country.

Board of Trade.

The Ministry of Health controls the work of local authorities in all matters affecting public health. Its duties relate to a variety of subjects including sanitation, poor law, town-planning, insurance schemes against sickness, old age, widowhood, orphanage and a number of similar services.

Health.

The Board of Education is a statutory body. Like the Board of Trade, it never meets. Its president is the political chief of the department, and administers the national scheme of education, both state-aided and state-provided.

Education.

The Ministry of Agriculture and Fisheries, for the most part, performs duties sufficiently indicated by its name.

Agriculture.

The Ministry of Labour plays an important part in the settlement of industrial disputes. Also it deals with trade boards, labour exchanges and unemployment insurance.

Labour.

The Post Office has a state monopoly of the postal, telegraphic, and telephonic service of the country. The British Broadcasting Corporation is administered under a royal charter, but the Postmaster General replies to questions in Parliament relating to its working. As there are post offices in every part of the country, many government departments use the Post Office for various dealings with the public, such as the issue of licenses, the sale of insurance stamps, the issue of savings certificates, the conduct of savings banks, and the payment of old age, widows', orphans' and some other civil pensions.

Post Office.

The Ministry of Transport was created in 1919 in order to regulate and improve the means of locomotion and transport. It has large powers relating to railways, roads, harbours and canals.

Transport.

The Ministry of Pensions distributes pensions arising out of the casualties of the Great War, 1914-18. Its work is naturally diminishing every year.

Pensions.

The Office of Works provide buildings for government departments in all parts of the country and attends to their repair. The Commissioners of Works also look after the royal palaces and royal parks. Their chief is the First Commissioner, sometimes included in the Cabinet.

Works.

The Attorney-General and the Solicitor-General are not heads of departments. But their work is very important and merits mention here. They advise the government departments on legal issues, act as prosecutors, and represent the Crown in proceedings affecting it. They may stop any criminal proceedings, even those instituted by private citizens by entering a *nolle prosequi* (a statement that the party prosecuting will not further prosecute his claim). This power is subject to no appeal, and is used for preventing vexatious prosecutions (*b*).

Attorney-General and Solicitor-General.

(*b*) *Reg.* v. *Allen* (1862), 1 B. & S. 850.

CHAPTER XII

THE PERMANENT CIVIL SERVICE

The Modern Service.—Behind and below the cabinet and other ministers are the departments, manned by the civil service. This service is, in some ways, the most vital part of the system of government, and its evolution during the last sixty years is a contribution of the highest importance to the technique of representative government. Prior to 1870, it presented some of the worst features of a patronage system. John Bright rightly described the Foreign Office as the outdoor relief department of the British aristocracy. Recruitment is now normally made by competitive examinations conducted by the Civil Service Commissioners, though exceptions are made in case of technical appointments and certain of the higher appointments. The conditions of service are regulated by the Treasury in consultation with the departments, and promotions depend on the political chief of each department and his advisers. Since the Great War, salaries have been considerably increased. Normally, the age for retirement is sixty.

Recruited by competitive examination.

High salaries.

Four Main Classes.—Broadly speaking, the service may be divided into four main classes: writing assistants, who do mechanical work ; clerical assistants, who perform routine duties involving minor responsibility ; the executive class, whose work involves some degree of initiative and creativeness ; the administrative class who are concerned in the making of policy. The entire service consists of about three hundred thousand persons . . .men and women. Normally, the latter must be either unmarried or widows. The administrative class, who are recruited at the stage of a university degree, are only about fifteen hundred in number.

Tenure.—Legally, the tenure of the civil servant is at the pleasure of the Crown (*a*), and there is no legal right to claim a pension (*b*), though that is a valuable consideration for his services and is in fact paid. In case of refusal, even his salary can only be claimed through a Petition of Right. But in practice, a permanent civil servant is not removed except for gross misconduct or inefficiency.

No party loyalty.

He is expected to serve, to the best of his ability and with a loyal neutrality, every administration, irrespective of its political complexion. The responsibility for all the work of a department rests with its chief, whether he has actually approved of a particular act or not. An individual civil servant is therefore never criticised in Parliament for any error. The minister accepts all responsibility. In 1917, the Government of India's conduct of the Mesopotamian campaign was censured, especially on the ground of gross mismanagement of hospital arrangements. When a demand was made for a judicial enquiry into the conduct of the persons concerned, the Secretary of State, Mr. Austen Chamberlain, though he had no real responsibility whatever in the matter and was removed by two steps from the Indian service which was at fault, assumed technical responsibility and resigned.

Civil servants not discussed in Parliament.

The Franchise.—A civil servant may exercise the franchise, but must not appear publicly as a political partisan. He cannot sit in the House of Commons, and must resign office if he decides to seek election. Nor is a civil servant re-employed after he has thus resigned.

Cannot sit in the Commons.

Merits of the System.—Apart from the Foreign Office, the most important members of the civil service are drawn from the middle classes rather than from the aristocracy, and the service has justly earned a

(*a*) *Dunn* v. *R*, [1896] 1 Q.B. 116.
(*b*) *In re Irish Civil Servants* (1929), 98 L.J.P.C. 39.

reputation for combining bureaucratic efficiency with a liberal outlook. Ministers are, no doubt, technically responsible for all policy, but it is obvious that in many cases the suggestions that they adopt really emanate from their civil servants. The present system of co-operation between the political ministers who change periodically and the civil servants who continue in office whatever party is in power makes for progress on one hand and stability on the other.

Efficiency and liberal outlook.

CHAPTER XIII

THE ROYAL FORCES

The Army.—The King is in supreme command of all forces by sea, land, and air, though the Sovereign has not personally commanded his forces since the end of the eighteenth century. Surrounded by the sea, England's main defence has always been her navy. The army has, from early times, been regarded with a certain suspicion, as a weapon which may on occasion be used for suppressing the legal rights and liberties of the people. The Bill of Rights, 1689, enacts that "the raising or keeping of a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is contrary to law." In time of peace, therefore, the King may not keep a standing army without the consent of Parliament. But in case of invasion or rebellion, he may call to arms all able-bodied subjects. Outside the kingdom, he is free to maintain a military force or to conduct a war, without reference to Parliament. But in actual practice this is impossible, for Parliament alone has the power to supply funds without which an army cannot be maintained. It is on account of the same suspicion that every year the Army Act is passed as an annual Act, permitting a definite number of troops to be kept for the following year. At the end of one year, the Act ceases to be law, and if it were not renewed before it has ceased to be in force, the keeping of the Army would become illegal, except in the event of war. In the absence of this Act, a soldier would not be liable to military law, desertion would only be a breach of contract, and hitting an officer would amount to no more than an assault.

No standing army in peace time without consent of Parliament.

Army Act an annual Act.

Navy.—The navy has always been maintained under the prerogative powers of the Crown, and not under statutory authority from Parliament. But since Parliament

alone can sanction the funds necessary for its maintenance, indirectly it has complete control over naval policy. Naval discipline is governed by permanent Acts (*a*) which do not require renewal every year like the Army Act. Military law applies to naval officers and seamen precisely as it applies to officers and soldiers in the army. The Royal Marines are a force of infantry and artillery, maintained by the Admiralty, and capable of service on land or sea. When on naval ships, they are considered as part of the naval forces. But when quartered on shore, their discipline is governed by the Army Act.

Air Force.—The Royal Air Force was constituted in 1917 by an Act of Parliament which like the Army Act requires annual renewal. Since that year the Army (Annual) Act has renewed both the Army and the Air Force Act, and is now known as the Army and Air Force (Annual) Act. The Air Ministry regulates the Air Force in the same manner as the War Office regulates the Army.

Compulsory Service.—The Crown has a prerogative right to "impress" seafaring men into the navy, and formerly this right was actually exercised. At present, however, compulsory service in the fighting forces requires legislative sanction, which was duly granted during the Great War, in 1916.

Military Law.—As soon as a soldier enlists or an officer accepts a commission, he becomes under military law. Disobedience to military superiors is regarded as an offence under military law, but not under the ordinary law. A servant leaving his master's service before the expiry of his term commits a breach of contract, no doubt, but no criminal offence. But if a soldier similarly leaves the army, he is guilty of the offence of desertion, and is punishable with severe penalties in time of peace and with death in time of war. An officer's conduct may not amount to a crime under the ordinary law, but if it is "unbecoming to an officer and a gentleman", he may be punished under military law. In the Army Act are codified the rules which govern the conduct of men in military service, and offences against military law are triable by a special military tribunal called a

(*a*) Naval Discipline Acts, 1866 and 1884.

Court Martial. But if a person in military service is charged with an offence against a subject of the Crown, which is an offence both under military law and under the common law, he must be tried by a civil (*i.e.*, non-military) court. A case tried before a military court may be re-tried before a civil court, but a military court cannot re-try a case which has been tried by a civil court. Lastly, if there is a conflict between the civil and military courts, the authority of the former must prevail.

Military law must yield to Civil law.

Subject to Ordinary Law.—On enlistment, a soldier does not cease to be a citizen, and therefore continues to be governed by the ordinary law of the land. He undertakes fresh obligations, no doubt, and becomes liable to military law, but this does not release him from the duties of an ordinary subject of the King. If he commits a criminal offence, he must answer for it before a competent court in the same way as a civilian would. For debts and other civil liabilities he may be sued, and execution obtained against his property. But his person is exempt unless the sum due is above £30. This exemption does not now mean much as imprisonment for debt has been abolished. Whether or not a man is subject to military law is a question which civil courts must decide. They also interfere and award damages for any assault, false imprisonment, or other wrong inflicted by a military officer, acting *without proper jurisdiction*, on any person, even though it may be claimed that the injury is caused in execution of military discipline (*b*). But they do not interfere if injury is done within the limits of military jurisdiction. Such a case is dealt with by the military courts under the military code (*c*).

Military Orders.—A soldier is required by military law to obey orders received from his military superiors. But if obedience of such orders involves a breach of the law, he cannot excuse himself by pleading the orders of

(*b*) *Heddon* v. *Evans* (1919), 35 T.L.R. 642.
(*c*) *Dawkins* v. *Lord Paulet* (1869), L.R. 5 Q.B. 94.

his superior. His position may sometimes be one of utmost difficulty. "He may be liable to be shot by a Court Martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it" (*d*). His true duty is, even at the risk of disobeying his superior, to obey the law of the land. In practice however, courts do make allowances for the difficult position of soldiers, and not hold them criminally liable. "A soldier," said Willes J, (*e*), "acting under the orders of his superior officer is justified unless the orders be manifestly illegal." Again it has been held that "if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful the private soldier would be protected by the orders of his superior officer"(*f*). Also, in suitable cases, it is open to the Crown to exercise the prerogative of pardon, or to the Attorney-General to enter a *nolle prosequi*.

Soldiers' position at times extremely difficult.

Enlistment.—Finally, it is to be noted that enlistment, being a species of contract between the Sovereign and the soldier, is a civil proceeding. It may be the duty of a civil court to enquire whether enlistment has actually taken place, or whether under the terms of the contract a soldier is at any particular time entitled to a discharge (*g*).

(*d*) Dicey, *Law of the Constitution*, p. 299.
(*e*) *Keighly* v. *Bell* (1866), 4 F. & F. at p. 790.
(*f*) *Reg.* v. *Smith* (1900), 17 Cape of Good Hope, Supreme Court Reports 561.
(*g*) *Hearson* v. *Churchill*, [1892] 2 Q.B. (C.A.) 144.

CHAPTER XIV

EMERGENCIES AND MARTIAL LAW

Invasions and Emergencies.—When an invasion or other emergency has taken place, it is the right and duty of the Crown, its officers, and subjects to do everything in their power to repel attack and to deal with the emergency. In fact if the officers of the Crown do not take prompt action, they are guilty of criminal negligence (*a*). For these purposes the Crown has certain discretionary powers in time of emergency. It may requisition any British ship in territorial waters though the emergency be not an "instant and urgent necessity"(*b*). In extreme cases it may even inflict death.

The Prerogative.—The Petition of Right, 1628, declared it illegal for the Crown to issue commissions in time of peace to try civilians by martial law. This term has been used in more senses than one, and has therefore caused considerable confusion of ideas. Among other senses, it has been used as a synonym for military law. In fact, the two must be carefully distinguished. Military law governs the conduct of members of the forces of the Crown during their service, in time of peace or war. It is administered by special tribunals, but is law in the proper sense of the term, and is embodied by Parliament in the Army Act and the Naval Discipline Act. It does not apply to civilians.

Martial Law.—Properly speaking, martial law means the suspension of ordinary law and ordinary courts and the assumption by the executive of arbitrary powers when war or insurrection has broken out. In effect, it nullifies all that the constitution stands for. Yet there is no doubt that under certain circumstances, and subject to certain limitations, such action is within the constitutional

Martial law is the assumption of arbitrary powers by the executive in time of war or disturbance.

(*a*) *Rex* v. *Pinney* (1832), 5 C. & P. 254.
(*b*) *Crown of Leon* v. *Admiralty Commissioners*, [1921] 1 K.B. 395, 604.

competence of the Crown. It has undoubted power to declare war with a foreign country. Such a declaration is binding upon all courts beyond any question. But as regards the realm internally, the Crown has no prerogative right to declare war on the people. If the Crown declares a state of war internally, the courts are free to enquire into the declaration. It is only when the country is actually in a highly disturbed state amounting to war that the Crown is justified in declaring martial law, so that "life may be protected and crime prevented by the immediate application of any force which, under the circumstances, may be necessary"(c).

Need not be proclaimed.

But martial law is independent of any proclamation. It comes into existence as soon as an emergency has arisen. Proclamation may be evidence of a state of emergency, but quite apart from any proclamation, force may be used for restoring order. The subject has a right to question the application of force by the executive, and it will be for the courts to decide whether or not a state of martial law existed at the time when force was used.

Courts decide whether martial law existed when force was used.

Officers of the Crown and all others, who have taken part in suppressing disorder, are liable civilly as well as criminally for any excess of force they may have used.

No force permitted when courts are available.

No punishment must be inflicted, nor any prisoners retained after resistance has ceased and the ordinary courts are available.

Courts under Martial Law.—Under martial law the ordinary courts do not function, and the military authorities settle all disputes through courts martial. These courts try and suppress disorder. They are not really courts at all as their primary concern is the suppression of disorder, not the administration of justice. When once order has been restored, the ordinary courts *ipso facto* begin to function again, and are free to enquire whether the Crown

Ordinary courts enquire into the working of martial law.

(c) *Per* Cockburn, C. J., in *Rex* v. *Nelson and Brand* (1867), Cockburn's Charge, 59; 11 Digest 535, 385.

exercised its prerogative rightly, whether there was as a matter of fact a state of war in the country, and whether during the state of war the conduct of the authorities was in conformity with law.

Wolfe Tone's Case.—In 1798, after the suppression of the Irish rebellion, an Irish rebel Wolfe Tone was sentenced to death by a court martial for participating in the rebellion and in the French invasion which accompanied it. Just before the execution, an application was made to the Irish King's Bench for a writ of *habeas corpus*. The prisoner's counsel admitted his guilt. But he argued that Wolfe Tone was not a member of His Majesty's army, and therefore could not be tried by a court martial while the great criminal court of the land, the King's Bench, was sitting; that courts martial may only be endured while war is actually raging; that martial law and civil law are incompatible with one another; and that when the latter exists the former must cease. In 1798 Ireland was in the midst of a revolutionary crisis, Wolfe Tone's substantial guilt was admitted, and the judges personally detested the rebellion. Yet the writ applied for was at once granted (*d*).

Martial law and Civil law incompatible.

Recently it was decided in the Irish Courts that the civil courts are bound, when their jurisdiction is invoked, to decide whether or not there exists a state of war or armed rebellion (*e*).

Is It Law?—To avoid difficulties arising from uncertainty as to the extent of the Crown's prerogative in this connection and to protect military officers and other servants of the Crown who have been in charge of a disturbed area, a declaration of martial law is invariably followed by an Act of Indemnity. Such an Act is intended to protect persons who have acted in good faith from all civil and criminal liability, not persons who have acted *mala fide* and without due regard

After martial law, Acts of Indemnity.

(*d*) *Wolfe Tone's case* (1798), 27 St. Tr. 614.

(*e*) *R.* v. *Military Governor of Military Internment Camp* (1924), 1 I.R. 32.

to humanity (*f*). Doubts have been expressed whether the Crown can validly exercise the prerogative claimed by it to declare a state of war *inside* the realm. Perhaps, its exercise can only be justified as an extension of the common law right and duty of all—Crown as well as subjects—to put down disorder, by such force as may be necessary. The true view of martial law is that it is no law at all. "It is by this time a very familiar observation," said Lord Halsbury, "that *what is called 'martial law' is no law at all.* The notion that 'martial law' exists by reason of the proclamation . . . . . . is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called 'courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war . . . . But to attempt to make these proceedings of so-called 'courts martial' administering summary justice under the supervision of a military commander analogous to the regular proceedings of Courts of Justice is quite illusory" (*g*). Martial law, it may be said, does not exist in England in the continental sense of an extraordinary jurisdiction to which the government can have recourse at its discretion, but exists only in the sense that in time of war or insurrection, the Crown may exercise as much force as necessary in order to restore order.

Martial law is no law.

Dicey's Four Points.—Summing up his conclusions regarding martial law, Dicey laid down four important rules. *Firstly,* martial law cannot exist in time of peace. *Secondly,* the existence of martial law does not in any way depend upon the proclamation of martial law. Its only effect is to give notice of the intentions of the

(*f*) *Wright* v. *Fitzgerald* (1799), 27 State Tr. 759, 765. Also reference may be made to the Indemnity Act, 1902, s. 1 (*i*), which expressly restricts the indemnity afforded to the authorities to acts done in good faith and in the public interest.

(*g*) *Tilonko* v. *A-G. of Natal*, [1907] A.C. 93, P. C. at pp. 93-94.

government. *Thirdly,* the courts have, at any rate in time of peace, jurisdiction in respect of acts which have been done by military authorities and others during a state of war. *Fourthly,* the proper protection of military men and others against actions or prosecutions in respect of unlawful acts done during a time of war, *bona fide,* and in the service of the country, is an Act of Indemnity.

Necessity.—"Martial law", said the Duke of Wellington, "is neither more nor less than the will of the general who commands the Army, in fact no law at all." It constitutes a serious encroachment upon the rights and liberties of the subject, and its sole justification is necessity (*h*). Martial law is invariably followed by an Indemnity Act . . .a tacit recognition of the fundamental principle that the common law rights of the subject cannot be interfered with except by an Act of Parliament or by a well-established rule of law.

Necessity alone justifies martial law.

Recent History.—There has been no declaration of martial law in England since the Petition of Right, 1628. But it has been proclaimed in Ireland (in 1798), in the colonies, in Ireland again during the Great War, and in the Punjab in 1919. In subsequent years, extraordinary powers have been exercised in different parts of India by summary courts, by virtue of detailed ordinances, which make no mention of the term martial law. Important cases arose from the Boer War at the end of the last century and the Irish insurrection in the present century. The celebrated Wolfe Tone case (*i*) had laid down that no man could be punished by a military court so long as there existed a civil court to grant *habeas corpus.* Later cases have laid down new doctrine. In a South African case Lord Halsbury held that "where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals" (*j*). This was a

(*h*) "The only principle on which the law of England tolerates martial law is necessity; its introduction can be justified only by necessity, its continuance requires precisely the same justification of necessity and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence"—*Per* Sir James Mackintosh, in 1838, cited in Dicey, p. 541.

(*i*) 27 St. Tr. 614.

(*j*) *Marais* v. *General Officer Commanding,* [1902] A.C. 109.

departure from the earlier view that jurisdiction exists except when the courts have to be suspended on military grounds. The decision was a Privy Council decision, and therefore not binding on English courts. Its correctness has been challenged by eminent lawyers (*k*) and the judgment has not been followed in England. But it has been followed in several recent Irish cases.

Defence of the Realm Acts.—During the Great War when emergencies arose everyday, the need was felt for an extraordinary jurisdiction to which government could have recourse at its discretion. Regulations were made which even authorized the imprisonment, without trial, of persons of hostile origin or association, from motives of caution, and deprived them of the right to *habeas corpus,* which normally is considered a vital principle of the constitution (*l*). Such jurisdiction was established under the Defence of the Realm Acts for the period of the war, but nothing less than an Act of Parliament could authorize it, as there was no war *within* the realm.

Emergency Powers Act.—More recently, statute has conferred upon the government a general permanent right of recourse to exceptional powers of a restricted character (*m*). This right can, of course, be modified and revoked at the discretion of Parliament. Under this Act, if a body of strikers or other persons have taken, or are about to take, steps which are likely to interfere with the supply of food, water, fuel, or light, or with the means of locomotion, or to deprive a substantial portion of the community of the necessities of life, the Crown may proclaim a "state of emergency", and issue drastic regulations as orders-in-council in order to frustrate such designs. But the state of emergency is not to last for more than one month, unless a fresh proclamation declares a fresh period of emergency. The regulations can remain in force only for seven days. But the two Houses of Parliament may decide to continue, amend, or revoke them. If Parliament is not sitting, it must meet within five days of the issue of the proclamation. The regulations may

(*k*) Including Dr. Holdsworth and Sir F. Pollock in *xvii Law Quarterly Review.*

(*l*) *Rex* v. *Halliday,* [1917] A.C. 260.

(*m*) Emergency Powers Act, 1920.

cover a wide range of topics and may be of a sweeping nature, but they must not have the effect of establishing conscription, or altering the existing procedure in criminal trials, or imposing penalties for peaceful picketing. They may provide for summary trial of persons violating the regulations with maximum penalties of £100 fine or three months' imprisonment. They cease to be operative, unless they are confirmed within seven days by both Houses.

The Emergency Powers Act was inspired by the threat of a strike in 1920. The powers of the executive now rest upon special legislative sanction. This legislation may have the effect of rendering obsolete the conception of martial law.

CHAPTER XV

POLICE, PARDON, ALIENS ETC.

Police.—The police force of England is comparatively a recent organisation (*a*). It was created in 1829 by an Act introduced by Sir Robert Peel, then Home Secretary. There is no one police force for the whole of England. The Metropolitan police is under the control of the Home Secretary. Outside London there are county and borough forces. These forces are annually reviewed by inspectors who report to the Home Secretary. On his certificate of efficiency, the nation contributes half of the expenses for the upkeep of the local police forces. This power of the purse gives the Home Secretary considerable control over them. Under statutory authority, he makes regulations regarding their pay, allowances, pensions, clothing and conditions of service. The local authority appoints, pays wages and dismisses, but the central control of the Home Secretary is important.

In the Metropolitan area, the police is directly controlled by the Home Secretary. The force is administered by a Commissioner of Police, appointed by the Crown on the recommendation of the Home Secretary. The Commissioner controls traffic in the streets and on the river, licenses costermongers and hawkers, has other wide powers for ensuring the good government of London. The headquarters of the force is at Scotland Yard, where a body of expert detectives is maintained in addition to the ordinary constabulary.

(*a*) "In spite of repressive measures until the end of the 18th century the conditions alike of London and the provinces were deplorable. Robbery and violence were rampant everywhere, highway men infested the roads, foot-pads lurked in the streets whilst, but too often, both watchmen and inkeepers were accessories to the commission of crime. At the commencement of the 19th century it was computed that there was one criminal to every 22 of the population. Such was the state of affairs when, in 1829, Sir Robert Peel laid the foundation of that organization on which is based the existing metropolitan system"—*Encyclopædia Brittanica,* 14th ed., Vol. 18, p. 158.

Like other citizens, a police constable is subject to the jurisdiction of the courts. If he exceeds his powers and thereby causes injury to a private citizen, he is liable to be sued for damages. He has more extensive powers of arrest than a private person, even when he is acting without a warrant. He is protected if he commits an illegality arising from the fact that a warrant is issued in excess of jurisdiction.

Pardon.—All criminal offences are deemed to be committed against the King, who has the prerogative to grant pardon to an offender or to commute the penalty to a less severe one. The prerogative is exercised only on the advice of the Home Secretary. The latter may obtain the opinion of the Court of Criminal Appeal on any petition for mercy. Pardons are of three kinds; a *free pardon* which rescinds both the sentence and the conviction; a *commutation*—a capital sentence is usually commuted to penal servitude for life; a *remission*, which merely reduces a sentence of imprisonment. The prerogative is exercised, only, when the offence is of a public character, and pardon will not operate as a licence to commit crimes.

Aliens.—The admission, supervision and deportation of aliens is governed by statute (*b*) and statutory regulations. Health, good character, and sufficient means are among the requirements which an immigrant must satisfy if he contemplates permanent residence. Permission to enter is, as a rule, refused if the alien intends to take employment which will displace a British worker. The police register aliens and supervise their movements under orders from the Home Secretary, who also has power to deport an alien, convicted of certain crimes or otherwise undesirable.

Extradition.—Fugitive criminals, whether accused or convicted, may be surrendered to, or demanded from, a foreign power, if an extradition treaty has been made with such power. To this rule one important exception exists, namely, that the person in question must not be a political offender. The Home Office and the Foreign Office

(*b*) Aliens Acts, 1914 and 1919.

co-operate in extradition proceedings. A surrender is not made if the offence alleged does not substantially coincide with an indictable offence under English criminal law. It is also refused if a *prima facie* case cannot be made out, or the identity of the offender is not proved, or if the surrender is desired for a political object.

Chapter XVI

THE REVENUE

Essential Control.—The Bill of Rights, 1689, provided that money must be levied for the use of the Crown not by prerogative but by grant of Parliament, and only in such ways and for such periods as Parliament has sanctioned. It is for the executive to raise money and to spend it, but the raising and the spending both require the authority of the legislature, which means in practice the authority of the House of Commons expressed in Acts such as the Finance Act and the Appropriation Act, which are passed every year. Without such sanction the executive cannot force any one to pay a penny by way of taxation (*a*) nor may it spend a penny out of the revenues collected.

Money raised and spent only under authority of the Commons.

Taxes are levied by the Finance Act, every year. Or they may be levied by specific Acts such as the Income Tax Act, 1918. This Act imposed the tax but left the rate to be fixed each year through the Finance Act. The entire revenue from all sources is paid into the Bank of England to the account of His Majesty's Exchequer and is known as the *consolidated fund.*

Finance Act.

Out of this nothing can be spent, except upon the authority of an Act of Parliament, granting certain moneys to the Crown as the head of the executive. If such Act of Parliament is a permanent one, the payments authorized by it are called *'consolidated fund services'.* If the Act is only an annual one, the payments are known as *'supply services'.* The independence of judges, of the Speaker of the House of Commons, and of the Comptroller-and-Auditor-General is of vital importance, and their salaries are accordingly

Consolidated fund services.

(*a*) This rule was strictly interpreted in *Attorney-General* v. *Wilts United Dairies* (1921), 37 T.L.R. 884.

charged permanently upon the consolidated fund. But if Parliament wishes to have an opportunity each year to review the work of an official or department, the payment is made a supply service. Among the principal consolidated fund services are the interest on the National Debt, the King's Civil List (*i.e.*, Parliamentary allowance for the King's household and other purposes) and the salary of the Speaker, of the comptroller-and-auditor-general, and of all judges from the Lord Chancellor (*b*) down to the county court judges. The work of these officials does not therefore come up for criticism in Parliament each year. The supply services include the armed forces of the Crown, the civil services, the revenue services and even the small sums paid yearly to the British Museum. The process of voting these items each year is an important constitutional check on the Crown and its servants, as Parliament must not only sanction the issue of the whole sum but must appropriate each particular payment to the particular service for which it is required.

Supply services.

Comptroller-and-Auditor-General.—But even when Parliament has given its sanction, no credit for any amount can be placed at the disposal of a spending department, till the sanction of the comptroller-and-auditor-general has been obtained. He is a high official, debarred from sitting in the Lords or the Commons. Though appointed by the executive he is absolutely independent of the cabinet. He holds office during good behaviour, and can be dismissed only if both Houses present an address demanding his removal. He controls the issue of public money, and he audits public accounts. It is his duty to see that expenditure out of the national revenue is incurred only under the authority of an Act of Parliament. The Treasury is the only office through which public moneys are drawn out from the Bank, and every time the Treasury requires money for any public service, it must send a requisition to the comptroller-

The Comptroller controls all expenditure.

(*b*) Only £6,000, which he receives as Lord Chancellor—not the £4,000, which he receives as presiding officer for the House of Lords.

general. It is for this officer to authorize the payment of a particular sum required out of the public moneys deposited at the Bank. Before doing so, he must satisfy himself that he has authority to do so by the terms of the Act under which the demand is made, and that every other formality required by law has been observed. Till then he will not grant a credit to the Treasury, and without this credit the Bank will not make payment.

Completely outside politics.

The comptroller's functions are of the highest importance. He is completely outside politics, and his tenure of office is independent of government. He has no interest in deviating from law. He prevents all irregularities on the part of the government in drawing out public money.

Careful audit every year.

He also audits the public accounts every year, and the audit report is submitted to Parliament so that once again it gets an opportunity to ensure that the ministry has not done anything contrary to the fundamental rules governing the administration of the public revenues. The audit is not a mere formality, and every item of expenditure, however small, which appears irregular is examined in detail.

If at any time, the comptroller should adopt a perverse attitude, and without proper cause refuse to sanction expenditure of public money, there are only two ways of dealing with him: *firstly,* he can be dismissed from office on an address of the two Houses, *secondly,* the High Court can be moved to issue a writ of *mandamus* which will require him to do something which appertains to his office or duty.

Note—Dicey mentions the following interesting instance of the Comptroller's check on government expenditure:—

"The Comptroller's power of putting a check on government expenditure has, oddly enough, been pushed to its extreme length in comparatively modern times. In 1811 England was in the midst of the great war with France; the King was a lunatic, a Regency Bill was not yet passed, and a million pounds were required for the

payment of the navy. Lord Grenville, the then Auditor of the Exchequer, whose office corresponded to a certain extent with that of the present comptroller-and-auditor-General, refused to draw the necessary order on the bank, and thus prevented the million, though granted by Parliament, from being drawn out. The ground of his lordship's refusal was that he had received no authority under the Great Seal or the Privy Seal, and the reason why there was no authority under the Privy Seal was that the King was incapable of affixing the Sign Manual, and that the Sign Manual not being affixed, the clerks of the Privy Seal felt, or said they felt, that they could not consistently with their oaths allow the issue of letters of Privy Seal upon which the warrant under the Privy Seal was then prepared. All the world knew the true state of the case. The money was granted by Parliament, and the irregularity in the issue of the warrants was purely technical, yet the law officers—members themselves of the ministry—advised that Lord Grenville and the Clerks of the Privy Seal were in the right. This inconvenient and, as it seems to modern readers, unreasonable display of legal scrupulosity masked, it may be suspected, a good deal of political by-play. If Lord Grenville and his friends had not been anxious that the Ministry should press on the Regency Bill, the officials of the Exchequer would perhaps have seen their way through the technical difficulties which, as it was, appeared insurmountable, and it is impossible not to suspect that Lord Grenville acted rather as a party leader than as Auditor of the Exchequer. But be this as it may, the debates of 1811 (*c*) prove to demonstration that a comptroller-general can, if he chooses, put an immediate check on any irregular dealings with public moneys" (*d*).

(*c*) Cobbett's Parl. Debates, xviii. pp. 678, 734, 787.
(*d*) Dicey, *Law of the Constitution*, pp. 317-18.

CHAPTER XVII

THE ACTUAL PROCESSES OF GOVERNMENT

Officers and Departments.—In preceding chapters we have described the main functions of the more important officers and departments of state. Alike in peace and in war, in maintaining internal order and resisting external aggression, in keeping up diplomatic relations with foreign states, in the making of laws and in interpreting some of them, in the raising and spending of national revenues, and in various other matters, the executive plays a most important part. The King is the head of the executive and possesses a mass of prerogative rights for carrying on the government of the realm. In actual fact, he takes no part in the executive government of the country, and his prerogative powers are exercised by his ministers, who perform executive acts in his name. In the few cases when he is expected to act, he must act upon the advice of his ministers. This advice he cannot reject so long as the ministers continue to be his servants. For all advice that they give to the King they are responsible to Parliament. They are also responsible to it for all acts which they or their subordinates do in the discharge of their official duties.

The King performs all functions through his ministers.

They are responsible to Parliament.

The law imposes upon ministers and other servants civil as well as criminal responsibility for all their public acts. They cannot plead in defence either the orders of the King or any state necessity. The King himself is required to observe the law both by statute and by virtue of the coronation oath. The validity of every exercise of his prerogative rights may be examined in a court of law, and whenever the Crown or its servants are in doubt

They cannot plead the King's orders or state necessity as defences.

as to the law on any point, it is their duty to obtain proper legal advice in order to obey it, not to disregard it. As the King can do no wrong, he cannot be proceeded against in any court for a crime or for a tort. But the remedy by Petition of Right is available in case of a breach of contract, or where the property of the subject has found its way into the hands of the Crown. The King is expected to summon Parliament at least once every year. If he fails to do so, he is sure to find himself in serious difficulty before long, as in the absence of Parliament, there is nobody who has the legal power to vote supplies to him.

Conventions.—Reference has been made in this and in previous chapters to certain constitutional practices, which it would not be correct to call rules of law, but which more or less receive recognition such as is accorded to rules of law. These understandings and practices have been described as customs or conventions of the constitution. They cannot be directly enforced through any court. If any one violates them, his conduct is unconstitutional rather than illegal. They determine the manner in which rules of law should be applied, so that, at any particular period, they may give expression to the prevailing sentiment regarding public affairs. Constitutional rules do not change frequently. But national circumstances do, and with them the national outlook. A new emphasis may be required, though the old rule remains. Conventions satisfy the need for change even if the forms of old laws continue to be venerated. "Conventions grow up," it has been observed (*a*), "at all times and in all places where the powers of government are vested in different persons or bodies—where in other words there is a mixed constitution," in order to secure the harmonious working of component parts which is essential for the well-being of the state. In law the King may veto a Bill, by convention he may not. In law the Lords are

Constitutional morality—violation unconstitutional, but not illegal.

Conventions change as circumstances require.

(*a*) *Per* Dr. Holdsworth, in *17 Iowa Law Review*, p. 162.

free to differ from the Commons, by convention they must give in if the electorate is clearly with the Commons.

The Force Behind Conventions.—In England, we have constitutional statutes, constitutional decisions, and constitutional conventions. The greater part of the consitutional law rests upon the last element. Conventions regulate, among other things, the exercise of the prerogative, that is, the discretionary power of the Crown. It is the King's prerogative right to appoint his ministers. Convention requires that he must appoint men who command the confidence of the House of Commons. If the cabinet is defeated in the Commons on an important issue, it must resign office. No court can enforce this duty which no law has ever laid down. But if the cabinet declines to resign, it is sure to come into conflict with Parliament and the law before long. Parliament can, for instance, decline to pass the annual Army Act. Then the keeping of even a single soldier would become illegal. Or, Parliament may decline to pass the budget. Then the raising and spending of a large part of the national revenues will become illegal. It has been said that these difficulties constitute the sanction for conventions of the constitution. However, sometimes they may not arise for months together, whereas public opinion gives its verdict immediately. More important as a sanction is the consideration of honour, tradition, and custom which will effectively prevent a Prime Minister from courting popular resentment and forfeiting all political credit in the country by going counter to the accepted notion of constitutional propriety.

Why conventions are followed.

Fear of conflict with law.

Public opinion.

Honour and tradition.

The conventions of today are the result of a gradual growth which started from the revolution of 1688. The House of Commons has always claimed the right to overthrow a ministry whose policy does not meet with its approval, and convention permits a government to be formed only if it can count upon the support of the electorate as represented in the Commons, without which it is impossible to give effect to its policy. This convention

acknowledges the strength of the claim made by the Commons. The legislative and the executive power vests in the Crown, the Lords, and the Commons and it is a matter of vital importance that these three should co-operate. Experience has shown that for this purpose the conventions which have prevailed from time to time have rendered essential service. For a considerable time now, the actual working of the constitution has depended not so much on substantive law, which can be enforced by the courts, as upon conventions which cannot be thus enforced. But these have enjoyed wide recognition and are looked upon as if they were rules of customary law.

Conventions Vary in Vitality.—It will be a mistake, however, to imagine that all constitutional conventions are of equal strength and vitality and receive uniform obedience. A Bill does not become an Act till the royal assent is given. Convention has made this assent purely formal, and it is difficult to imagine circumstances under which the King can veto a Bill. A peer must not interfere in the elections to the House of Commons. This convention is now practically a dead letter, and peers freely take part in such elections. At some point or other, in the event of a dead-lock, the Lords ought to give way to the Commons. The point referred to here must always remain more or less vague. A treaty should not be concluded, or a war entered upon, contrary to the wishes of the legislature. The cabinet must be unanimous in public. The former is observed, but the latter convention has not been adhered to in recent years. The Prime Minister must be a member of the House of Commons. This convention rests only on a single precedent. But it is believed to be a strong convention. Convention required that the cabinet shall not interfere with the internal affairs of the self-governing Dominions. Recently this convention was replaced by statute (*b*).

Royal veto.

Lords and Commons.

Cabinet united in public.

Prime Minister must be a commoner.

Conventions are followed because, otherwise, constitutional difficulties would arise and the machinery of

(*b*) Statute of Westminster, 1931.

government will not run smoothly. The weight of each is to be judged from the reason underlying it. If the reason is good, a single precedent is sufficient to establish a rule. If not, a series of precedents will be of little avail in creating a binding convention.

Conventions and Political Sovereignty.—The supreme merit of conventions is that they bring out clearly the distinction between legal and political control. The King appoints his Prime Minister legally. But he must appoint the man who has the largest following in the House of Commons. Legally, the King can dismiss his Prime Minister. In actual fact, if he is defeated in the Commons on an important issue he must resign his office. In other words the Prime Minister, who in effect exercises all the powers of the Crown, can exercise them only so long as he enjoys the confidence of the House of Commons, that is to say, in the last resort of a majority of the parliamentary electors. As Dicey (*c*) said, "the prerogatives of the Crown have become the privileges of the people." Conventions subordinate legal to political sovereignty, and give expression to the will of the electorate.

Conventions express the popular will.

The King's Influence.—The King is the supreme head of the executive. His immense legal powers have been detailed in preceding chapters. In practice, his ministers act for him. Where he acts in person, he must act on the advice of his ministers. Convention does not permit the Sovereign to reject such advice. The King reigns, but does not govern. Is he then a mere cipher, and his value merely ornamental?

It is true that he cannot act against the advice tendered by his ministers without causing a constitutional upheaval of the first magnitude. But his influence remains. He is the head of the social system, and as the fountain of honour his prestige is enormous. He may reprimand ministers who fail in duty or in respect, and he may, as Bagehot says, advise, encourage and warn them.

The King's influence great.

Warns ministers.

(*c*) *Law of the Constitution*, p. 463.

He sees all relevant official papers and may annotate them. The minutes of each cabinet meeting are sent to him. He receives in audience at short intervals his Prime Minister, whatever party may be in power. He must be consulted on all important changes in the policy or the personnel of the government. He is the one man who at different times hears from the acknowledged leader of each party a detailed account of its policy. He is acquainted with more state secrets than anybody else in the realm. These circumstances combine to raise his prestige, and to give weight to his advice whenever there is a crisis in the country. On the occasion of the House of Lords controversy in 1911, the Ulster crisis of 1913-14, and the financial crisis in 1931, it is beyond doubt that sitting far away from the public gaze, he played an important part in the working of the constitution. In Dominion affairs, he is today the visible symbol of imperial unity. In foreign affairs too, the King's influence can be and has been at times considerable. The history of recent years is yet to be written in detail, but it is now well known that King Edward VII played a decisive part in the shaping of foreign policy in the early years of the present century. When war broke out in 1914, the German Kaiser is said to have exclaimed "The dead Edward is stronger than the living I!" (*d*). During the last two hundred years, the King has become a constitutional monarch and has lost in definable powers. In England there have been revolts against monarchs, but not against monarchy, and whenever the occupant of the throne is a powerful personality, gifted with tact and initiative, the Sovereign's share in the actual handling of affairs is very considerable.

Receives cabinet minutes.

State secrets.

Times of crisis.

Edward VII.

(*d*) Betrand Russell, *Freedom and Organization*, p. 501.
The author observes: "There was a larger element of truth in this view than Englishmen, complacently confident in their Parliamentary constitution, have been inclined to believe."

PART IV

THE JUDICIARY

CHAPTER I. THE COURTS AND JUDGES.
II. THE CROWN AND JUSTICE.

CHAPTER I

THE COURTS AND JUDGES

Special Features.—In England there is no separate judicial profession, and appointments to the bench are made from among men of ripe age and experience practising at the bar. The judges sit singly or in small groups. Their salaries are definitely higher than those of judges in other countries. All serious crimes and several civil cases are tried before juries. Special facilities exist for appeals, sometimes as many as three appeals being allowed. For certain of the lower courts lay magistrates are appointed.

Judges recruited from the bar.

The Courts.—The High Court of Justice is established by statute (*a*), and consists of three divisions. The Lord Chancellor is President of the Chancery Division, the King's Bench Division is under the Lord Chief Justice, and the Probate, Divorce and Admiralty Division under a President. The puisne judges are styled Justices of the High Court. The King's Bench Division deals with common law actions in addition to its criminal and appellate jurisdiction. It has also power to supervise inferior courts and judicial bodies. Trials take place in this Division either before judges and juries, or before judges alone. The Chancery Division deals with matters of equity jurisdiction, though under the Judicature Act, a judge of the High Court may sit in any division, and it is open to any division, to give any remedy whether it is based on the common law or on equity. This Act fused the two jurisdictions. The Chancery Division deals, among other things, with partnerships, mortgages, trusts, specific performance

High Court.

King's Bench.

Chancery.

(*a*) The Supreme Court of Judicature (Consolidation) Act, 1925, which summed up the Judicature Acts 1873-1910 and other legislation on the subject.

of contracts and administration of the estates of deceased persons. The work of the Probate, Divorce and Admiralty Division is sufficiently indicated by its name. It is concerned with collisions at sea, probate of wills and the granting of matrimonial remedies.

Probate, Divorce and Admiralty.

The jurisdiction of the High Court is unlimited as to amount. It hears appeals from inferior courts. From it appeals lie to the Court of Appeal and thence to the House of Lords as a Judicial body. The House of Lords is the supreme tribunal for England and Wales, Scotland, and Northern Ireland, exercising normal appellate jurisdiction in civil cases and extraordinary appellate jurisdiction in criminal cases. It has also original jurisdiction to try persons who are impeached by the House of Commons and peers accused of treason and felony. This privilege of being tried by their peers extends to peeresses in their own right and the wives and unmarried widows of peers, and it cannot be waived. Since 1844, a convention has prevailed that when the House is engaged in judicial work, only Law Lords should take part in the proceedings, and the House is made up of the Lord Chancellor, seven Lords of Appeal in Ordinary (who are peers for life), ex-Lord Chancellors and other peers who have held high judicial office.

Court of Appeal.

House of Lords.

The High Court formerly had final authority in criminal matters. In 1907 was constituted the Court of Criminal Appeal consisting of the Lord Chief Justice and all the judges of the King's Bench. The quorum is three. The court will not allow an appeal if it is satisfied that there has been no miscarriage of justice though there may have been some irregularity. It insists that there should be a high standard of care in all criminal proceedings, and its watchfulness has led to a marked improvement in the administration of criminal justice. The Home Secretary may, on his own initiative, ask for the opinion of this court on any case, even when the prisoner does not bring an appeal. He may also ask for its opinion on any petition for mercy.

Court of Criminal Appeal.

The great and growing mass of litigation cannot all be dealt with by the central courts. Accordingly, commissions of assize are issued to High Court judges and sometimes to eminent barristers who are not High Court judges to visit the Assize Districts in order to decide civil and criminal cases. These Assize courts are branches of the High Court. For cases in London and the surrounding districts, the Central Criminal Court at the Old Bailey acts as the Court of Assize.

Assize Courts.

For the less serious criminal offences there is the Court of Quarter Sessions, in which justices of the peace sit—not altogether a satisfactory arrangement. In boroughs with their own Quarter Sessions, a paid Recorder presides over the court. Minor criminal cases are dealt with at Petty Sessions, presided over by justices. In the towns these functions are performed by stipendiary magistrates and in London by police magistrates. From these courts appeal lies to Quarter Sessions, and in some cases to the High Court.

Quarter Sessions.

Civil jurisdiction is exercised by the County Courts and certain minor courts. The former have also a limited jurisdiction in admiralty and bankruptcy cases.

The Coroner investigates all cases of suspicious death, and deals with matters of treasure trove, with the help of a jury.

Juries.—Women may now sit on juries. Since 1922, jury lists have been based on the parliamentary register. Juries decide matters of fact, while the judges decide all questions of law. In the seventeenth century, in an important Crown prosecution, in spite of threats and browbeating by the court, the jury returned a verdict of not guilty. Each member of the jury was then fined by the judge and committed to prison in default of payment. As the jury refused to pay the fine, they were all imprisoned. A writ of *habeas corpus* having been obtained for Bushell, one of the jurors, it

was stated that the court had committed the jurors to prison for returning a verdict of not guilty contrary to clear evidence and the direction of the court. It was held that this was no sufficient cause for fining a jury, and the prisoners were discharged (*b*).

Juries cannot be penalized for perverse verdicts.

In civil cases, juries are not called for chancery cases, but in common law actions they can be had at the desire of the parties. By consent, a majority decision may be accepted. Otherwise, a new trial is necessary. In criminal cases, the verdict must be unanimous. If not, the normal procedure is to have a second trial.

The Judicial Functions.—It is the duty of the judiciary to interpret and apply the law, and it is essential for the proper discharge of their duties that judges should enjoy security of tenure. The superior judges hold office during good behaviour, and though appointed by the Crown, they can be dismissed only on an address from the two Houses of Parliament. Inferior judges hold office during the King's pleasure, but in practice are not dismissed except for grave reasons. In interpreting statutes, the judges must be guided by the language of the statutes, and not by any discussions in Parliament or outside relating to them. But they have, no doubt, more latitude to consider extraneous circumstances when the wording of an Act is ambiguous. In the process of interpreting and applying laws, judges in England have performed a great service by transforming, in the course of centuries, a mass of uncertain customs into the tolerably coherent system of the common law. This process still continues. Even the statute law of today is mostly common law in a codified form. But courts are not free to depart from decisions of the House of Lords which is the highest court. "A decision of this House", it has been said, "once given upon a point of law is conclusive upon this House afterwards, and it is

Judges dismissible only on an address from both Houses.

Judges made the common law.

(*b*) *Bushell's case* (1670), 6 St. Tr. 999.

impossible to raise that question again as if it was *res integra* and could be re-argued, and so the House be asked to reverse its own decision" (*c*).

Public Policy.—The courts have also played an important part in declining to enforce conditions laid down in contracts and other transactions on the ground of what is called public policy. Such action relates, among other things, to agreements in restraint of marriage or trade, corrupt dealings in titles of honour, the sale of public offices and trading with the enemy. Public policy is an elastic term. On the whole today there is a tendency not to extend its conception but to adhere to the heads which already exist. As was rightly observed, "public policy is a very unruly horse, and when you once get astride it you never know where it will carry you" (*d*).

Control by Writs.—The courts also control the operations of judicial and ministerial officers by what are called prerogative writs. The *writ of prohibition* is issued to an inferior court to prevent it from proceeding with a case which is beyond its jurisdiction. *The writ of certiorari* is issued by a higher court demanding records of a case tried before a lower one in order that irregularities may be ascertained and corrected. The *writ of mandamus* is an order issued by the King's Bench Division to public officers or bodies to do some particular thing which appertains to their office and duty. Thus the writ may order the admission or restoration of the applicant to an office of a public nature, to university degrees or to the use of a meeting house. It is generally granted when there is no other equally efficacious remedy available to compel performance of the duty, for instance, an action for tort against the officer or body in question. It is not issued against the Crown, for the King cannot command himself to do an act. Nor is it issued against a minister

Highly efficacious remedy.

(*c*) *London Street Tramways Co.* v. *London County Council*, [1893] A.C. 375, at p. 379.

(*d*) *Per* Burroughs J., in *Richardson* v. *Mellish* (1824), 2 Bing. 229.

who is acting as an agent of the Crown and is responsible only to the Crown, and has no duty to the subject (*e*). The issue of the writ is entirely at the discretion of the court. But it will not be issued unless the applicant has demanded performance of a duty owed to him and has been refused.

Vocational Associations.—The courts do not exercise any serious control over vocational associations such as the General Council of Medical Education. This council has a right to remove a doctor's name from the register, and can thus practically prevent him from exercising his profession (*f*). But the courts do insist upon a due observance of the requirements of natural justice, so that if a member is to be expelled or penalized, the authority taking action must be properly constituted in accordance with the rules of the association, the offending party must be given full particulars of the charge against him, and he must be given a fair hearing in his defence. In brief, proceedings must be judicial, not partisan in spirit. However, it is worthy of note that where lawyers are affected, their efforts to secure an appeal to court of law have been successful. The Law Society may, after due enquiry in legal form, enforce discipline and remove a member from its rolls. But the member has a right to appeal to the High Court.

Miscellaneous Duties.—The courts also administer trusts and wind up joint stock companies. They distribute bankrupt estates, and pass decrees of divorce. The Rules Committee, consisting of the Lord Chancellor, the Lord Chief Justice and certain other judges has statutory power to make rules of procedure. This function is legislative in character, and the rules can only be annulled by an order-in-council on an address from either House of Parliament.

Merits and Demerits.—The higher courts have justly acquired a reputation for genuine independence and freedom from corruption or political influence. These

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(*e*) *R.* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387.

(*f*) *R.* v. *General Medical Council, Ex parte Kynaston,* [1930] 1 K.B. 562.

virtues are especially notable in criminal trials. But there has been some tendency to make judicial appointments a reward for eminent barristers who have taken prominent part in the House of Commons. Litigation is extremely costly, and its delays have become proverbial. Also, there is in many cases no adequate certainty of decision.

In the lower courts, which come nearest to the lives of the people, the standard of efficiency is not the same as in the higher courts. The paid magistrates discharge their duties very satisfactorily. But the lay magistrates have usually no legal training and in many cases owe their position to political considerations. In consequence, there is frequently disproportion in the punishments inflicted, a tendency to partisanship in political and industrial cases, and class discrimination in offences like disorderly conduct or drunkenness in the case of persons in charge of motor vehicles.

Security of Tenure.—It is a matter of paramount necessity that judges should be independent of the executive and should not have to suffer for acts done in the discharge of their duties. The necessity is greater in a country like England, where the personal liberties of the subject are not guaranteed by any written constitution, but rest on the decisions of ordinary courts. When the executive have detained someone in custody, and judges issue a writ of *habeas corpus*, the protection which they thereby afford to the subject amounts to a control exercised over the executive. The executive should therefore not be in a position to put pressure upon the judges. Much less should they be in a position to dismiss them. It is accordingly provided by statute (*g*) that the Crown appoints judges, and they hold office during good behaviour, and that they can be dismissed by the Crown only on an address from the two Houses of Parliament.

The executive cannot dismiss judges.

Judicial Immunities.—So also, a judge is not liable to be sued for words spoken or acts done by him in his judicial capacity. "It is essential in all courts that the

(*g*) Judicature Act, 1925, s. 12.

judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences" (*h*). Again, it has been said that this protection exists for the judge "although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office" (*i*). The ground for this rule is public policy.

Judges not liable for judicial acts.

But the judges must have acted within jurisdiction. "If a judicial officer acts outside his jurisdiction, he is not acting as a judicial officer at all, and he is in no better position than any one else" (*j*). For this purpose superior judges are deemed always to act within their jurisdiction. Their immunity is therefore absolute (*k*). Inferior judges are immune if they are misled into acting outside their jurisdiction by false allegations of fact which, if true, would have given them jurisdiction (*l*). But they are liable if they are led to assume a jurisdiction by a mistaken view of the law. Protection exists only for judicial acts, not for ministerial acts of a judicial officer. So, a judge is not liable for a wrongful decision, but is liable if he wrongfully refuses to hear a case (*m*).

The immunity is not limited to judges. In fact "neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office . . . . . and this, though the words written or spoken were written or spoken maliciously without any

(*h*) *Scott* v. *Stansfield* (1868), L.R. 3 Ex. Ch. 220, where the words complained of were: "You are a harpy living upon the vitals of the poor."
(*i*) *Per* Lord Esher in *Anderson* v. *Gorrie*, [1895] 1 Q.B. 668.
(*j*) *Palmer* v. *Crone*, [1927] 1 K.B p. 808.
(*k*) *Anderson* v. *Gorrie*, [1895] 1 Q.B. 668.
(*l*) *Houlden* v. *Smith* (1850), 14 Q.B. at p. 851.
(*m*) *Fergusson* v. *Earl of Kinnoul* (1842), 9 Cl. & F. pp. 312-313.

justification or excuse, and from personal ill-will" (*n*). Justices of the peace enjoy the same exemption as inferior judges when exercising purely judicial functions (*o*).

£500 fine if vacation judge refuses *habeas corpus.*

The immunity of judges rests on public policy, which aims solely at securing an independent judiciary for the subject, whose liberty should be the highest care of the state. For this reason the important exception is made that if a High Court judge wrongfully refuses to issue a writ of *habeas corpus* during vacation, he is liable to a fine of £500, which is paid to the person detained.

Judges not discussed in Parliament.

In short, we may say that while most other servants of the Crown are dismissible at the King's pleasure, judges can be removed *only* on an address from the two Houses of Parliament. Their salaries are not voted annually, and therefore, their administration cannot be debated in Parliament in the ordinary course as the administration of most other Crown servants can be. Indeed Parliamentary procedure requires that a judge must not be criticised except upon a substantive motion. Nor can proceedings be taken against them for any acts done or words spoken while acting in their judicial capacity. Their immunity is a triple immunity—from administrative control, from Parliamentary discussion and from legal proceedings.

(*n*) *Per* Lopes, L.J. in *Royal Aquarium Co* v. *Parkinson*, [1892] 1 Q.B. at p. 451.

(*o*) *Law* v. *Llewellyn*, [1906] 1 K.B. 487.

CHAPTER II

THE CROWN AND JUSTICE

The King's Courts.—The King is the fountain of justice. All courts are the King's courts, and all jurisdictions are derived from him. But his powers are delegated to his judges. When James I wanted to exercise the judicial function in person, Coke, with great difficulty persuaded him after a long and pedantic argument that that was the function solely of his judges: "God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it" (*a*).

Justice only through judges.

Other Prerogatives.—So also the King's prerogative regarding the creation of courts is limited. "It is a settled constitutional principle or rule of law, that although the Crown may by its prerogative establish courts to proceed according to the Common Law, yet that it cannot create any new court to administer *any other law*" (*b*). If the King's Attorney-General states he will not prosecute (enters a *nolle prosequi*), a criminal prosecution comes to an end. This power is subject to no appeal, but its exercise may be discussed in Parliament to which all ministers are responsible for all their acts (*c*). A prosecution may also be prevented or stopped if the King pardons the offender. This power is generally exercised after sentence, and only

(*a*) *Prohibitions Del Roy* (1607), 12 Co. Rep. 63.
(*b*) *In re Lord Bishop of Natal* (1864), 3 Moo. P.C. (N.S.) 115; K. & L. 278.
(*c*) *R.* v. *Allen* (1862), 1 B & S. 850.

on the advice of the Home Secretary. It is confined to offences of a public nature where the Crown is prosecutor. A subject's right or benefit cannot be affected or removed in this way.

The Crown and Legal Proceedings.—The King can only be made to answer to a superior for his actions. Therefore he cannot be sued in his own courts. This immunity applies to the King's personal actions, to contracts entered into by government departments for the Crown and to wrongs committed by ministers and other servants of the Crown in the discharge of their official duties. But there exists in certain cases a special remedy known as the Petition of Right, by which the subject petitions the King to do him right. In addition, there is the doctrine of ministerial responsibility, which means that if a minister commits an unlawful act, he can be sued for the wrong personally, even though he may have committed the wrong as an agent of the Crown, or even by its express order.

Petition of Right.—A Petition of Right is available against the Crown in case of a breach of contract, or where the property of the subject has found its way into the hands of the Crown. The procedure is now governed by statute (*d*). The injured party petitions the Home Secretary for leave to sue the Crown. On the advice of the Attorney-General, the King grants his fiat in all cases where there is any scintilla of a just claim (*e*). Then the action proceeds as if it were an action between private citizens, and judgment may be given against the Crown. The petitioner cannot enforce the judgment, but the Crown invariably gives effect to it. Hence a declaration of the petitioner's rights is in practice as effective as a judgment in an ordinary suit.

Miscellaneous Immunities.—A servant of the Crown cannot be sued upon a contract entered into by him on

(*d*) Petition of Right Act, 1860.

(*e*) "Everybody knows that fiat is granted as a matter, I will not say, of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim, nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous"—*Per* Bowen, L.J., *In re Nathan* (1884), 12 Q.B.D. at p. 479.

behalf of his principal. This rule is based on the ordinary law of agency (*f*). The Crown itself cannot hamper its freedom of action by contract in matters which concern the welfare of the state. It has been held immune from all liability where the government promised not to detain a certain Swedish ship which was trading with Great Britain during the Great War and subsequently detained it for its own use (*g*). So also, the Crown cannot be sued by any servant for wrongful dismissal (*h*), though there is a strong convention against arbitrary dismissal of servants.

Torts.—But no Petition of Right will lie under any circumstances for a tort, that is, a wrongful act independent of contract. "The only cases", said Cockburn, C. J., "in which a Petition of Right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or where the claim arises out of contract for goods supplied to the Crown or the public service . . . . . the maxim that *the King can do no wrong* applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the sovereign.

Ministers suable for torts.

"*Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a Minister of the Crown is without a remedy*. As the sovereign cannot authorise a wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown . . . a servant of the Crown is responsible in Law for a tortious act done to a fellow subject, though done by the authority of the Crown—a proposition which appears to us to rest on principles which are too well settled to admit of questions, and which are alike essential to uphold the

(*f*) *Macbeth* v. *Haldimand* (1786), 1 T. 172.

(*g*) *The Rederiakitiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500.

(*h*) *Dunn* v. *The Queen*, [1896)] 1 Q.B. 116.

dignity of the Crown on the one hand and the rights and liberties of the subject on the other" (*i*).

Ministerial Responsibility.—The principle of ministerial responsibility is one of the greatest safeguards of the liberty of the subject. It was not till the seventeenth century that it was fully established. In the reign of Charles II, when Lord Danby was impeached, one of the articles of impeachment was that he had written a letter to the King of France proposing a secret treaty of peace only a few days after Parliament had voted money for a war with France. The letter was endorsed with the words "This is written by my orders—Charles." But it was held that this endorsement was no defence (*j*).

King's authority, no excuse.

Early in the last century, the official residence of the Speaker of the House of Commons was burnt through the negligence of some servants of the Crown, causing the Speaker damage to the extent of about £10,000. He filed a Petition of Right to make good the loss. The petition was rejected. It was held: "If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the sovereign to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy (*k*)." The only remedy in such cases is to sue the actual wrongdoer, and if judgment is obtained against him, the Crown usually satisfies the judgment. The head of a government department is not liable for the torts of his subordinates, unless the act complained of is substantially the act of the head himself. The theory is that the subordinates are not the servants

No liability for subordinate's torts.

(*i*) *Feather* v. *The Queen* (1865), 6 B. & S. 257.

(*j*) *Danby's case* (1679), 11 St. Tr. 599.

(*k*) *Viscount Canterbury* v. *The Attorney-General* (1843), 1 Phill. 306. "If that act be one of wrong it cannot be imputed to the Sovereign, although it were done by his express command; and the remedy is against the servant only. In every other case, I am prepared to hold that the remedy is by Petition of Right."—*Per* Palles C.B., *Kildare County Council* v. *R.*, [1909] 2 I.R. 199, at p. 232.

of the head of the department. Like him they are servants of the Crown (*l*). Thus it has been held that the Postmaster-General is not liable for the negligence of a subordinate who laid an electric wire negligently and thereby caused personal injuries (*m*). In all cases the servants actually committing or ordering the wrong are personally liable. The commander of a man-of-war was employed to suppress the slave trade on the coast of Africa. He wrongfully seized a vessel belonging to Tobin on mere suspicion and sank it. Tobin filed a Petition of Right to recover compensation. It was held that such a petition does not lie against the Crown for a tort because *"that which the sovereign does personally, the law presumes will not be wrong; that which the sovereign does by command to his servants cannot be a wrong in the sovereign"* (*n*). Tobin should have filed a suit against the commander. In the eighteenth century, Lord Halifax, Secretary of State, issued a general warrant to search for and seize the papers of the editor of *The North Briton*, without specifying the name of any offender. In execution of this warrant, Wood entered the house of John Wilkes, broke his lock, and seized his papers. Wilkes sued for trespass and claimed damages. The defendant pleaded that he had acted under a legal warrant. Wilkes was awarded heavy damages. It was held that a general warrant, which did not specify the names of offenders, and which therefore gave a discretionary power to messengers to search any one they may chance to suspect, is illegal and totally subversive of the liberties of the subject (*o*).

No Petition of Right for a tort

General Warrants illegal.

In recent years, it has been laid down by statute that certain government departments may sue and be sued in their own name. Thus the Minister for Transport may be sued for breach of contract or for tort (*p*).

Procedural Advantages.—The Crown enjoys certain advantages of procedure in all legal proceedings. It has

(*l*) *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.
(*m*) *Bainbridge* v. *Postmaster-General*, [1906] 1 K.B. 178.
(*n*) *Tobin* v. *The Queen* (1864), 16 C.B.N.S. 310.
(*o*) *Wilkes* v. *Wood* (1763), 19 St. Tr. 1153.
(*p*) Ministry of Transport Act, 1919, s. 26.

at its disposal the resources of the public purse. Formerly, unless statute provided to the contrary, the Crown neither paid nor received costs. But now in civil proceedings to which the Crown is a party, and in any arbitration, the costs are in the discretion of the court or arbitrator in the same manner as in cases between other parties (*q*). When the Crown sues, it employs archaic forms in Latin or old English, which involve the defendant in additional expense. Also, the Crown is not bound to disclose documents as private individuals are though the court can inspect any document in order to decide whether its claim for privilege from discovery is valid (*r*).

(*q*) Administration of Justice Act, 1933.
(*r*) *Robinson* v. *State of South Australia*, [1931] A.C. 704.

PART V

DUTIES AND RIGHTS OF THE SUBJECT

Chapter I

BRITISH SUBJECTS

British Subjects.—A British subject (*a*) is a man or woman who owes permanent allegiance to the Crown. Such a person is said to have British nationality. His allegiance is distinguished from the allegiance of an alien, who owes only temporary allegiance to the British Crown while he is within the British dominions. One may become a British subject at birth or at some later time. In the first case the person is known as a natural-born British subject. Allegiance and protection are in their nature reciprocal. The former ceases when the Sovereign can no longer *de jure* protect his subjects, as happens, for instance, on the conquest of a certain territory.

Nationality rests on allegiance.

Natural-born Subjects.—Exceptions apart (*b*), every person born within the British dominions is a natural-born British subject from the very moment of his birth irrespective of his parentage or race. The son of an Afghan subject born in Delhi is as much a British subject as a son of English parents born in London. The important point is birth within the British dominions, strictly so called. Subjects of Indian States occupy an anomalous position. They have not got British nationality for purposes of English law but enjoy protection at the hands of the Crown. Subject to certain conditions, a person born outside the British dominions is also a natural-born British subject, if at the time of such person's birth his father is a British subject.

Birth within the British Empire.

Nationality Acquired Later.—In some cases a person acquires British nationality not at birth, but at a later

(*a*) The law on this subject now rests on the British Nationality and Status of Aliens Acts, 1914-22.

(*b*) Thus a man born on a British ship or in a British ambassador's house in a foreign country is also a British subject.

date. When the Crown acquires fresh territory, all nationals of that territory, resident in that territory, usually become British subjects. If an alien woman marries a British subject, the marriage immediately confers British nationality upon her. This status will continue even if the husband dies, or the marriage is dissolved.

An alien may also acquire British nationality by naturalization.

Naturalization.—This depends upon the discretion of the Home Secretary. The applicant must have resided in British territory for five out of the eight years immediately preceding his application. For the last one year he must have resided in the United Kingdom. He must intend to live there, must know the English language, and be of good character. If he has been in Crown service abroad, this may be regarded as equivalent to residence, for this purpose. The certificate of naturalization is entirely at the discretion of the Home Secretary. But once granted, it is valid throughout the British Empire. The Dominions have passed reciprocal legislation, and their governments also grant naturalization which is valid throughout the Empire. A Dominion or colony may also grant local naturalization, valid only within its boundaries. A person thus naturalized is treated as an alien in the United Kingdom. "A man," said Darling J., "may become the liege subject of the King in some parts of his dominions, yet not in all; and wherever he is not a subject, he is an alien" (*c*).

Naturalized persons may take high office.

When the Home Secretary has issued a certificate of naturalization to any one, and he has taken the oath of allegiance, he is, to all intents and purposes, in the same position as a natural-born subject, and is eligible for high office including membership of the Privy Council. But while the government have no power to deprive a natural-born subject of his nationality, the Home Secretary may *at his discretion* revoke a certificate of naturalization, even for such vague reasons

(*c*) *Markwald* v. *A. G.*, [1920] 1 Ch. 348.

as disaffection and disloyalty. The courts will not interfere with the exercise of this discretion at all.

Loss of British Nationality.—A British subject, naturalized or natural-born, may become naturalized abroad, and will then lose British nationality. If, by birth, he is also a subject of another state according to the law of that state, he may make a declaration of alienage when he attains the age of majority or later. Such a declaration will rid him of British nationality. But neither naturalization abroad nor a declaration of alienage is permitted in time of war if the effect would be to convert a British subject into an enemy alien.

A British subject may become an alien.

An Irishman, Mr. Lynch, became a naturalized burgher of the South African Republic and joined the Boer army in 1900 when war was raging in South Africa. After the termination of hostilities, he was prosecuted for waging war against the Crown and adhering to its enemies. The prisoner's defence was that under the Naturalization Act of 1870 (*d*) he no longer owed any allegiance to the Crown as he had become an alien. It was held that the Act did not empower a British subject to become naturalized in an enemy state in time of war, and such naturalization itself was an act of treason (*e*). Mr. Lynch was subsequently pardoned, and was elected to the House of Commons from an Irish constituency.

(*d*) S. 6 of the Act provided that: "Any British subject who has at any time before or who may at any time after the passing of the Act, when in a foreign state and not under any disability, voluntarily become naturalized in such state, shall from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject, and be regarded as an alien."

(*e*) *R.* v. *Lynch*, [1903] 1 K.B. 444; *Gschwind* v. *Huntington*, [1918] 2 K.B. 420. On the other hand where a British natural-born subject during the Great War was naturalized in Germany, it was held that he was a German subject for purposes of the execution of the provisions of the Treaty of Versailles, 1919, *re.* sequestration of the property of German nationals. The question whether he was "a German national" within the meaning of the Treaty was to be determined exclusively by German Law (Re. Chamberlain's Settlement, [1921] 2 Ch. 533.)

Aliens.—An alien has civil but no civic rights. He can engage in trade, own property and have redress at the hands of the courts. But he cannot own a British ship. Nor can he insist upon admission into the United Kingdom (*f*), and he may be deported as an undesirable alien. Even in the case of British subjects, their rights in different parts of the British Empire depend upon local law. Hence there is no legal bar to the exclusion of British Indian immigrants from the Dominions or the imposition of disabilities upon them. Aliens, of course, are liable to differential treatment. Thus Italian immigration into the Dominions is restricted, while Japanese (apart from minor exceptions) and Chinese immigration is totally prohibited.

Aliens have civil, but no civic rights.

Differential treatment.

(*f*) *Musgrove* v. *Chun Teeong Toy*, [1891] A.C. 272.

CHAPTER II

DUTIES OF THE SUBJECT

Allegiance.—Every subject owes the duty of allegiance to the Crown, whether he has taken the oath of allegiance or not. The oath is demanded only from certain high officials when they assume office, from members of Parliament, from persons on whom peerages and dignities are conferred, and from aliens on becoming naturalized British subjects. If any one violates the duty of allegiance, he is guilty of high treason, the most serious offence under the criminal law. At the present day, the law recognizes four important forms of treason, concerned immediately with the personal safety and dignity of the King:

All subjects owe allegiance.

Treason.

(*a*) Compassing the death of the King, Queen, or Prince of Wales:

(*b*) Levying war against the King or adhering to his enemies in his realm, or giving the King's enemies aid or comfort, in the realm or elsewhere;

(*c*) Violating the Queen, the wife of the Prince of Wales, or the King's eldest daughter, if she is unmarried;

(*d*) Slaying the Chancellor or the Treasurer or the King's justices, while in their places doing their offices.

The law also punishes various acts calculated to endanger or alarm the King or disturb the public peace. Any tampering with the loyalty of troops, causing disaffection among the police, or unlawful arming or drilling, while technically not amounting to treason, are breaches of the tie of allegiance which binds every

British subject to the Crown, and are punishable with serious penalties (*a*).

Military Service.—Allegiance casts upon seafaring men the duty of serving in the navy. The Crown is said to have the right of impressment. But for a long time now the navy has been manned by volunteers. Compulsory recruitment is only resorted to under statutory authority, as happened during the Great War. Regarding the army, the Bill of Rights, 1689, gives the control to Parliament, and renders it unlawful for the Crown to keep a standing army within the Kingdom in time of peace without the consent of Parliament, whether the army is raised by compulsion or by voluntary offer of service.

Compulsory service only by statute.

Maintenance of Order.—By ancient practice, it is the duty of every able-bodied subject to assist in the maintenance of order. If a felony is committed, or there is danger of a breach of the peace even a private citizen has the power to make arrests. The duty to assist is not confined to felonies. In 1832, the Mayor of London was found guilty of neglect to take proper steps to restore order, in spite of the advocacy of the great Erskine. The Mayor's duty, no doubt, was greater than that of the ordinary citizen. But the difference between the duties of the two was one of degree, not of essence. "By the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable and other peace officer is called upon to do all that in them lies for the suppression of riot, and each has authority to command

Subjects must help to maintain order.

(*a*) Police Act, 1919; Incitement to Disaffection Act, 1934, the passing of which aroused controversy, hardly created a new offence. But it gave the Crown new and drastic powers of procedure to discover preparations for seducing any of the armed forces of the Crown from their duty or allegiance. In effect, the police authorities may apply for a warrant to search premises for evidence of the commission of such an offence. But the warrant can only be granted by a High Court Judge. It applies only to a specified place. The offence alleged must have been committed within three months preceding the application. Such application cannot be made in respect of all kinds of sedition.

all other subjects of the king to assist them in that undertaking" (*b*).

Payment of Taxes.—Every subject is bound to pay taxes, but only those which have been voted by Parliament and embodied in a Parliamentary statute. In the famous Ship-Money case (*c*), one of the Judges of the King's Bench said: "I never read nor heard that Lex was Rex; but it is common and most true, that Rex is Lex (the King is the Law)". This doctrine has been most emphatically repudiated in English constitutional documents (*d*). But in spite of this, occasion has arisen even in recent years for appealing to the courts for protection against arbitrary taxation. In 1912, the High Court ordered the return of income-tax which had been collected on the strength of a vote of the House of Commons without being embodied in the Finance Act of the year (*e*). In 1919, a shipping company desired to sell four ships to foreign buyers. For this the licence of the shipping controller was necessary at that time. The licence was granted on condition that 15 per cent. of the purchase price was paid to the Exchequer. The money was paid under protest. It was held that the demand of a payment to the Crown as a condition of granting a licence amounted to levying money for the use of the Crown without grant of Parliament, and as such was contrary to the Bill of Rights, and therefore illegal (*f*).

Must pay taxes.

Sedition.—"Everyone," said Mr. Justice Stephen, "commits a misdemeanour who publishes verbally or otherwise any words or any document with a seditious intention" (*g*). By seditious intention is meant an intention "to bring into hatred and contempt or to excite disaffection against the person of Her Majesty,

Must not cause disaffection.

(*b*) *Per* Tindal, C.J., *Charge to the Bristol Grand Jury* (1832), 5 C. & P. 261.
(*c*) *R.* v. *Hampden* (1637), 3 St. Tr. 825.
(*d*) Ship Money Act, 1640; Bill of Rights, 1689.
(*e*) *Bowles* v. *Bank of England*, [1913] 1 Ch. 57, already referred to in detail in a previous chapter.
(*f*) *Brocklebank Ltd.* v. *The King*, [1925] 1 K.B. 52.
(*g*) *Digest of the Criminal Law*, Art. 91.

her heirs or successors, or the Government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or dissatisfaction among Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects". This is a long list of alternatives which may constitute the crime of sedition. Terms like contempt, disaffection, and ill-will are in their nature vague, and vagueness in such matters is a danger to the liberty of the subject. Juries therefore have been alert, and ready to resist any inroads by the executive upon the liberty of the subject. Sedition is punishable with imprisonment with or without fine.

State Secrets.—The duty in this respect is an old one. The growth of sensational journalism in modern times has made the supply of interesting information a very lucrative business. Parliament has for this reason passed two statutes (*h*) which aim at preventing, among other things, the disclosure of confidential papers, trespass on places like dockyards, arsenals and other buildings used for government purposes, and communication with foreign governments.

(*h*) Official Secrets Acts, 1911, 1920.

CHAPTER III

RIGHTS OF THE SUBJECT

Fundamentals.—The government of the people must be in accordance with law. "The King," said Bracton, one of the earliest writers on the subject, "ought not to be subject to man, but to God, and to the law; for the law maketh the King. He is not truly King where will and pleasure rule, and not the law." In the celebrated Ship-Money case (*a*), the argument of Hampden's advocate was briefly this: the law of England does not recognize acts of state—a tax can only be levied under an act of Parliament, and therefore the Crown's claim to levy taxes cannot be enforced—*Lex is Rex* (the law is king). Even one of the judges in that case, Sir Robert Berkley, whose views were royalist in the extreme, declared that the subjects "have a birthright in the laws of the kingdom. No laws can be put upon them; none of their laws can be altered or abrogated without common consent in parliament . . . . We have in print his Majesty's own most gracious Declaration, that it is his maxim, that the people's liberties strengthen the King's prerogative, and that the King's prerogative is to defend the people's liberties" (*b*). According to the coronation oath (*c*) which is administered by one of the archbishops, the King "solemnly promises and swears to govern the people of this kingdom of England and the Dominions thereunto belonging, according to the statutes in Parliament agreed on, and the respective laws and customs of the same".

The King is subject to the law.

In 1700, the above principles of the common law were embodied and declared by the Act of Settlement in the following words:—"*The laws of England are the birthright of the people thereof; and all the Kings and Queens who*

The laws are the birthright of the people.

(*a*) *R.* v. *Hampden* (1673), 3 St. Tr. 825.
(*b*) At p. 1090.
(*c*) Act for establishing the Coronation Oath, 1688.

shall ascend the throne of this realm ought to administer the government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same; and therefore all the laws and statutes of this realm, for securing the established religion and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force are ratified and confirmed accordingly."

In consonance with these doctrines, the rule has been evolved that "the King can do no wrong". This maxim is not a licence for arbitrary government. On the contrary, it provides the subject with a means of redress whenever he is injured by some action of the executive. It is obvious that a criminal prosecution of the King would be absurd. All criminal process issues in the name of the Crown, and the idea of the King prosecuting himself and condemning himself is one which can only bring the King and the courts into contempt and ridicule. Even the bringing of a civil suit for a tort against the King personally has been regarded as scandalous. Only when the subject demands the restitution of property which has irregularly found its way into the hands of the Crown, or for the due observance of the terms of a contract which has been entered into by the servants of the Crown on its behalf, can a suitor obtain direct redress against the Crown. This is by the respectful method of a Petition of Right.

The King can do no wrong.

As for crimes and torts, the King can do no wrong. It follows from this maxim that the King cannot authorize a wrong. If a subject prosecutes or sues someone for a crime or a tort committed against him, and the defence given is "I did this under orders from the King", the court would pay no heed to the defence and simply say "The King is incapable of giving orders of that kind." This legal fiction has been of the utmost service in protecting the liberty of the subject, by ruling out all defences based on the doctrine of 'act of state'. In the reign of Charles II, the Earl of Danby wrote a

This legal fiction protects the liberty of the subject.

letter to the King of France, proposing a 'secret treaty of peace' only a few days after Parliament had voted money for a war with France. Danby was impeached before the House of Lords. He proved that he had written the letter under express authority from the King. But this plea did not save him. In the eighteenth century, in the famous John Wilkes' cases the plea of 'act of state' was heard again. But it was of no avail. The Chief Justice brushed it aside with contempt.

He may prosecute or sue any official.

The great rule thus grew up that when a subject is injured by a Crown official, he can prosecute him criminally and sue him in tort for the unlawful acts committed by him. His official position cannot protect him. In fact he is sued not as an official but as a private person, because he cannot be a representative of the Crown while he is breaking the law.

Chapter IV

FREEDOM OF PERSON

Personal Freedom.—As there is no written constitution in England there is no special guarantee for personal liberty, as is the case in several countries where a written constitution prevails. The law protecting personal liberty is part of the ordinary law of the land.

He who is detained may sue.

Whenever any one exercises physical coercion or restraint, the person detained can bring a suit against him or prosecute him for assault, unless there is some lawful justification for the imprisonment.

While the police have considerable powers of arrest on suspicion, there is no power of arbitrary arrest. The private rights of a subject may only be interfered with on grounds recognized by law.

The Crown.

The Crown enjoys large immunities from legal process, but its servant who commits an illegality is not protected, even when he is merely carrying out orders received from a superior. The doctrine of 'act of state' cannot apply as between the Crown and its subjects. Nor is it a good defence for an illegal act to say that the public interest required it, except perhaps when there is a grave emergency.

General Warrants.—In general warrants no names are specified. Such warrants were probably first issued by the Court of Star Chamber. In the eighteenth century, George III's Government tried to put down the activities of John Wilkes and a publication known as *The North Briton*. Lord Halifax as Secretary of State issued warrants for the arrest of persons and the seizure of papers, without specifying the names of persons or particulars of papers to be seized, and certain other warrants in which a person was mentioned but no particulars of the papers required were given. Such

General warrants are illegal.

warrants were held to be illegal and bad (*a*). It was observed that if such warrants were legal, "the

(*a*) *Leach* v. *Money* (1763), 19 St. Tr. 1001 ; *Wilkes* v. *Wood* (1763), 19 St. Tr. 1153; *Entick* v. *Carrington* (1673), 19 St. Tr. 103.

secret cabinets and bureaus of every subject in this Kingdom will be thrown open to the search and inspection of a messenger whenever the Secretary of State shall think fit to charge, or even suspect a person to be the author, printer, or publisher of a seditious libel".

State necessity not recognized.

"*And with respect to the argument of State necessity*, or a distinction which has been arrived at between State officers and others, *the common law does not understand that kind of reasoning,* nor do our books take notice of any such distinctions" (*b*).

Exceptions.

But there are certain exceptions to the rule against general warrants. The most important are those allowed by statute in the case of official secrets and in cases where attempts have been made to incite the fighting forces to disaffection or disloyalty. If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence in connection with official secrets has been committed, or is about to be committed, he may issue a warrant to search any premises and any persons found on those premises and to seize any papers or other things which may be relevant to the matter in hand. In case of great emergency this power may also be exercised by a superintendent of police (*c*). Various other statutes authorize search warrants, *e.g.*, for explosive materials intended for criminal purposes, forged documents, counterfeit coins, and obscene books and pictures. Search may also be authorized for a woman or girl detained for immoral purposes, or for children who are being neglected or ill-treated. In certain cases, the police may search premises for stolen property without any warrant (*d*).

Infringement of Personal Freedom.—Whenever an interference with personal freedom cannot be defended on any of the grounds mentioned above, the injured party has the right to defend himself, to take criminal

(*b*) *Per* Lord Camden, C. J. in *Entick* v. *Carrington* (1763), 19 St. Tr. 1030.
(*c*) Official Secrets Act, 1911, s. 9.
(*d*) Larceny Act, 1916, s. 42 (2).

proceedings for assault, to bring a civil suit for damages, or to apply for a writ of *habeas corpus*.

Self-defence.

Self-defence is essentially an extrajudicial remedy. "Nature prompts a man who is struck to resist; and he is justified in using such a degree of force as will prevent a repetition" (*e*). Useful against private parties, it is practically useless against state officials, and highly inexpedient against the police, for if resistance cannot be justified the consequences will be more serious by reason of the special position of the police. The limits of the force which may be exercised are not clearly defined. But it must be such as is necessary, and proportionate to the harm which is resisted. It must be in self-defence, not in revenge. If these requirements are there, it may assume even extreme forms. When a landlord, accompanied by some friends, attempted to eject a tenant by force, and was shot through the keyhole by the tenant, it was held that the tenant was not guilty of an attempt at man-slaughter, because being already in his own house, he could not be expected to retreat any further (*f*).

Civil and criminal proceedings.

Civil and criminal proceedings can also be taken against a servant of the Crown, or any one else who may interfere with a man's personal liberty. But these proceedings are attended with the usual delays of the law. The speediest and the most effective remedy lies in the prerogative writ of *habeas corpus*.

Habeas corpus is the general remedy.

Habeas Corpus.—This is the most famous of all the prerogative writs, and has become the greatest safeguard against the encroachments of the government on individual liberty. On an application for a writ of *habeas corpus* the judiciary will cause the interference to cease.

By successive Acts of Parliament in 1640, 1679, and 1816, the writ of *habeas corpus* has been perfected, and today it is the general remedy against all unlawful imprisonment, more prized by prisoners than other remedies because it is more speedy and effective. The

(*e*) *Per* Parke, B., 2 Lewin 48.
(*f*) *R.* v. *Hussey* (1925), 41 T.L.R. 205.

prisoner or any friend on his behalf makes application to a judge of the High Court. There must be a *prima facie* case for granting the application, but usually the affidavit of the applicant is sufficient. The judge issues to the custodian a *rule nisi, i.e.,* a rule to show cause, and calls upon him to 'have the body' (*habeas corpus*) before the court on a certain day. The custodian must then produce the prisoner before the court, together with a 'return' or explanation of the cause of the detention. If there is a legal warrant, the court may remand him to custody, or enlarge him on bail, which must not be excessive (*g*). But if the imprisonment is unlawful the court makes the rule 'absolute' and orders the immediate release of the prisoner. Even if he is remanded to custody, the court orders that he must be tried within a limited time or set free. The Habeas Corpus Acts impose severe penalties on judges and other persons who fail to do their duty in connection with an application for this writ.

Judges fined if they fail in duty regarding this writ.

"The Judges, therefore," said Dicey (*h*), "are in truth, though not in name, invested with the means of hampering or supervising the whole administrative action of the Government, and at once putting a veto upon any proceeding not authorized by the letter of the law."

O'Brien's Case.—In March 1923, the Home Secretary ordered the arrest of one O'Brien, in London, and his deportation to Dublin. O'Brien, was alleged to be plotting against the government of the newly constituted Irish Free State, and he was to be interned there. In the following month O'Brien applied to a Divisional Court of three judges for a writ of *habeas corpus* against the Home Secretary. On their refusal, he applied to the Court of Appeal. In May, the writ was granted. But as the applicant was not at that time actually in the custody of the Home Secretary, he was allowed one week in which to obey the writ. The Home Secretary took advantage of this interval and appealed to the House of Lords. The

(*g*) The Bill of Rights, 1689, declared that excessive bail ought not to be required.

(*h*) *Law of the Constitution*, 8th. ed., p. 208.

House of Lords declined to entertain the appeal, and O'Brien was set free (i). An Act of Indemnity was hastily passed, under which O'Brien was given pecuniary compensation. But for this Act, there is no doubt, that he could have filed a criminal prosecution and a civil suit against the Home Secretary for illegal imprisonment.

Three important rules.

Three important rules follow from this decision: *firstly*, that when the writ is applied for against a particular person the writ will issue against him, even if he has ceased to hold the prisoner; *secondly*, that applicant may go from one court of competent jurisdiction to another until he obtains his writ; and *thirdly*, that when any court has ordered the release of the prisoner, there is no appeal against such order.

Lord Birkenhead's Judgment.—In the course of his judgment in the House of Lords, in the O'Brien case, Lord Birkenhead said: "It is perhaps the most important writ known to the constitutional law of England, affording as it does, a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

No appeal against discharge.

" . . . . if the writ is once directed to issue and discharge is ordered by a competent Court, no appeal lies to any superior court. Correlative with this rule, and markedly indicative in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from Court to Court until he reaches the highest tribunal in the land . . . . .

"It was established and indeed very often repeated in the learned judgments which were delivered in *Cox* v. *Hakes* that if upon the return to the writ it was adjudged that no legal ground was made to appear justifying deten-

(i) *Secretary of State* v. *O'Brien*, [1923] A.C. 603.

tion, the consequence was immediate release from custody, and if discharge followed, the legality of such discharge could never again be brought in question. Lord Halsbury L.C. summarized the matter in the following sentence (15 App. Cas. 522): 'It is the right of personal freedom in this country which is in debate ; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined *summarily and finally*, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal'."

Successive Applications.—More recently, a tribal chieftain on the West Coast of Africa was ordered by the Government of Nigeria to be deported. He applied for the writ of *habeas corpus* to one judge after another of the High Court of Nigeria. The Privy Council held that he was entitled to make successive applications to every court or judge of competent jurisdiction to hear the applications, and that on each occasion the application must be considered on its merits (*j*).

May apply from court to court.

When the prisoner has failed to obtain release at the hands of the High Court or one of its judges, he may appeal to the Court of Appeal, and thence, subject to certain conditions, to the House of Lords. But recourse to the Court of Appeal is not permitted when an application has been made for the deportation of the prisoner under the Fugitive Offenders' Act, 1881, and he has failed to obtain the issue of the writ in the King's Bench Division (*k*). The same rule applies if the prisoner's extradition has been ordered. When once any court of competent jurisdiction has ordered the release of a prisoner, there can be no appeal against it. But an appeal will lie if the object of the proceedings is only to determine which of two persons is entitled to the custody of a child (*l*). The *habeas corpus* is avail-

(*j*) *Eshugbayi Eleko* v. *Nigerian Government*, [1928] A.C. 459.
(*k*) *Ex parte* Savarkar, [1910] 2 K.B. 1056.
(*l*) *Bernards* v. *McHugh*, [1891] A.C. 388.

able to a wife against detention by her husband, or to parents against the detention of a child by an orphanage or similar institutions (*m*).

Somersett's Case.—Lastly, it may be noted that the right of personal freedom extends to aliens as well as subjects. Somersett, a negro slave, was brought to England by his master, Mr. Stewart. He ran away, but was recaptured and put on board a ship bound for Jamaica. The master of the ship, Knowles, kept the slave in irons. The negro's friends applied for a writ of *habeas corpus* which was granted, "It (slavery) is so odious", said Lord Mansfield, C.J., "that nothing can be suffered to support it, but positive law. Whatever inconveniences therefore may follow the decision, I cannot say this case is allowed by the law of England, and therefore the black must be discharged" (*n*). To avoid legal difficulties, Napoleon in the last century was kept at St. Helena, and the Egyptian leader Zaghlul Pasha in the present century was kept at Gibraltar, by special legislation (*o*).

Habeas corpus available to aliens.

Times of Emergency.—In times of emergency however, the executive finds the control exercised by the judges to be a serious obstacle in the way of a summary disposal of troublesome persons. What they want at such times is the power of arbitrary arrest and imprisonment. Such power can be given only by Parliament in the form of a suspension of the Habeas Corpus Acts. When the Acts are suspended, illegal arrest does not *ipso facto* become legal, but the remedy by *habeas corpus* is suspended. The object of the suspension is to give government a free hand to do things, which a critical situation might require, but which may or may not be strictly legal. Even then it is possible that the executive may do certain things from the consequences of which the

Parliament may suspend Habeas Corpus Acts.

(*m*) *Bernards* v. *Ford*, [1892] A.C. 326.
(*n*) *Somersett's case* (1771), 20 St. Tr. 1.
(*o*) See 56 Geo. III c. 22; *In re Zaghlul Pasha*, 67 S.J. 382 (Gibraltar Ordinance).

suspending Acts may not protect them. The period of suspension has usually been followed by an Indemnity Act.

The Great War.—During the Great War, the presence of alien enemies was considered by the executive to be a source of serious danger to the realm, and when alien enemies resident in the United Kingdom were deprived of personal liberty and detained as prisoners, the judges did not interfere with the discretion of the executive. "Above the liberty of the subject", said the judges (*p*), "is the safety of the realm, and . . . . when the internment of an alien enemy is considered by the Executive Government charged with the protection of the realm, desirable in the interests of the safety of the realm, . . . the action of the Government in so doing is not open to review by the Courts of law by *habeas corpus*."

Alien enemies.

Zadig was a natural-born German, naturalized as a British subject. The Home Secretary interned him on the strength of a regulation made under the Defence of the Realm Act, as being a person of hostile origin or association. Zadig contended that the Defence of the Realm Act, 1915, while authorizing regulations for public safety and defence, had expressly provided for the trial of British subjects in the ordinary courts by a jury; that a fundamental change in the rights of the subject could not be made by any general words but only by express words to that effect in the statute; that a penal statute must be construed strictly: and lastly, that the statute must not be construed in a sense repugnant to the spirit of the constitution. By a majority, the House of Lords held that the Home Secretary had unrestricted powers under the Act. Lord Shaw, in a dissenting judgment, was of opinion that the power to make regulations for public safety and defence, which was given by the Defence of the Realm Act, did not include the power to intern Zadig without a trial and indeed without bringing any charge against him, apart from saying that he was a person of hostile origin or associations;

(*p*) *Per* Bailhache, J., in *R.* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann*, [1916] 1 K.B. 286 at p 275.

that the prisoner had been "regulated" out of his liberty and out of every protection; that there is not in the statute a word about "hostile origin or associations", nor indeed, about internments; and lastly, that if Parliament had intended to make this colossal delegation of power, it would have done so plainly and courageously, and not under cover of words about regulations for safety and defence (*q*). By the legal profession generally this dissenting judgment has been regarded as the more correct exposition of the law.

In another war-time case, referring to the tendency to regard the Magna Carta and similar declarations of constitutional rights as specially sacrosanct, and therefore unalterable except by special Act of Parliament, Darling, J., remarked that the Magna Carta has not remained untouched and like every other law of England, it is not condemned to that immunity from development or improvement, which was attributed to the laws of the Medes and Persians" (*r*).

In yet another case of the same period, similar sentiments were expressed. "The Courts were always anxious," said Lord Justice Scrutton (*s*), "to protect the liberty of the subject. They did so both in the interests of the subject and in the interests of the State. In time of war there must be some modifications in the interests of the State. It had been said that war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of the Magna Carta."

It will be interesting to watch future developments of this war-time attitude of the judiciary in England.

The Crown may seize property.

Property.—The use and enjoyment of property are protected both by the civil and criminal law. In times of danger, however, the Crown may seize the property of the subject for the defence of the realm (*t*). But there is a usage of payment for such use

(*q*) *R.* v. *Halliday, ex parte Zadig,* [1917] A.C. 260.
(*r*) *Chester* v. *Bateson,* [1920] 1 K.B. 829, at p. 832.
(*s*) *In Ronnfeldt* v. *Phillips* (1918), 35 T.L.R. at p. 47.
(*t*) *Attorney-General* v. *De Keyser's Royal Hotel Ltd.,* [1920] A.C. at pp. 524-525.

of property. Parliament has an unrestricted right to levy taxation. It has authorized certain bodies to acquire land by compulsion when it is required for public purposes. For such acquisitions, compensation is payable.

The right to use or enjoy one's property, while it is very extensive, is not unlimited. Thus, an owner may not use his own land to create a nuisance, build a house on his own land without proper approval of plans, or drive a motor vehicle without a licence.

CHAPTER V.

FREEDOM OF DISCUSSION.

Freedom of Speech.—"The law of England," it has been said, "is a law of liberty, and consistently with this there is no *imprimatur*; there is no such preliminary licence necessary. But, if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal; and it is illegal, if it tends to the prejudice of any individual" (*a*). What is termed liberty of speech in England means that no licence is required for speaking or writing, and therefore everybody is free to say or write what he likes, provided that his words are not defamatory, seditious, blasphemous, or obscene. A person defamed may sue for damages. If the words used are likely to lead to a breach of the peace, he can take criminal proceedings. In a civil suit, truth is a complete defence, but in criminal proceedings the accused must in addition prove that the publication of his statement was for the public benefit. In all civil cases publication must be to a third party, but criminal liability may arise even if publication is made only to the person defamed. The basis of liability in the latter case is the danger of a breach of the peace.

One may say or write anything which does not violate a law.

Privilege.—In several cases there is privilege, absolute or qualified. Thus no proceedings for libel can be instituted against a judge, advocate, witness, or party for words uttered in the course of judicial proceedings, or against one making statements in the course of military or other state duty, or one who publishes reports by order of either House of Parliament. So also, a newspaper which publishes fair and accurate contemporary accounts of judicial proceedings cannot be

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(*a*) *Per* Lord Ellenborough in *R.* v. *William Cobbett* (1804), 29 St. Tr. 1.

proceeded against. In the above cases privilege is said to be absolute. In certain other cases, *e.g.*, where communications are made under a legal, social or moral duty, the defence of privilege will break down if there is express malice, that is some motive of revenge, or spite, or some desire inconsistent with the unbiassed discharge of duty. Such occasions are said to enjoy only 'qualified' privilege.

Absolute.

Qualified.

The Press.—For the most part, newspaper proprietors, editors, and contributors are subject to the same rules as other persons. But a prosecution for a libel contained in a newspaper cannot be commenced without the order of a judge of the High Court. Also, the defence of apology is available only in the case of a libel contained in a newspaper or periodical. But in such a case the defendant must prove that the libel was published without actual malice and without gross negligence, and that before the suit was brought, or at the earliest opportunity afterwards, he inserted a full apology for the libel in the newspaper or periodical concerned. Also money must be paid into court by way of amends so that no other defence denying liability can be pleaded (*b*). Recent legislation requires that newspaper reports of judicial proceedings must not contain any indecent matter (*c*).

The press is not under any censorship, but every newspaper and periodical must bear the name and address of its printer. Also, every printer of a newspaper must keep with himself one copy of every issue with the name and address of the person who employed him to print it written legibly upon it, so that any person who wishes to proceed for libel in respect of a newspaper article may be able to know whom to sue.

No censorship.

While there is no special law for the press, it would be a mistake to suppose that one is free to speak or write whatever he likes. The law of sedition punishes unlicensed

But offences punished.

(*b*) Lord Campbell's Libel Act, 1843.
(*c*) Judicial Proceedings (Regulation of Reports) Act, 1926.

speech and criticism of the conduct of the government. The law of blasphemy forbids the vilification of the Christian religion. But serious discussion is permitted, even if it denies the existence of God or Jesus Christ. The publication and transmission of obscene matter is also prohibited. Lastly, the censorship of plays may be noted. Every proprietor of a theatre who exhibits plays for money must have his theatre licensed either by the Lord Chamberlain or the magistrates, and he must not exhibit a play unless he has previously obtained the approval of the former. Any disregard of these rules is visited with serious penalties. No court interferes with the Lord Chamberlain's discretion.

CHAPTER VI

FREEDOM OF PUBLIC MEETING

Public Meeting.—In the English constitution there is no such thing as a right of public meeting. "The law recognizes no right of public meeting in a public thoroughfare—a public thoroughfare being dedicated to the public for no other purpose than that of providing a means for the public passing and repassing along it. A place of public resort is analogous to a public thoroughfare; and although the public may have often held meetings in places of public resort without interruption by those having control of such places, yet the public have no right to hold meetings there for the purpose of discussing any question whatever, social, political, or religious" (*a*).

One may go anywhere provided he does not thereby violate a law.

Everyone is free to go where he likes and to say what he likes, so long as he does not thereby violate any rule of law. When a number of men exercise this right in unison, the result is a meeting. But the object of a meeting must not be a breach of the peace, or other crime; and even when its object is not blameworthy, its manner should never be such as to cause apprehension of a breach of the peace in the minds of reasonable people (*b*).

Unlawful assembly.

Rules re Meetings.—If peaceable people in a locality where there is an assembly of three or more persons feel a reasonable apprehension that a breach of the peace is threatened, the assembly thereby becomes an unlawful assembly and its members become guilty of a misdemeanour. But it cannot become unlawful unless there is actually a meeting. Also, it does not become unlawful

(*a*) *R.* v. *Cunningham Graham* (1922), 16 Cox 420.
(*b*) *Charge to the Bristol Grand Jury* (1832), 5 C. & P. 261.

merely because it is expected that the gathering will meet with unlawful opposition. If a meeting has been advertised, the police have no authority to forbid the meeting being held, unless a regulation under the Emergency Powers Act, 1920, has conferred such authority upon it. But should a breach of the peace occur while the meeting is in progress, the police can disperse it. So also, a perfectly lawful meeting may be dispersed if the authorities on the spot come to the conclusion that peace cannot be preserved without dispersing it.

Police authority.

Salvation Army Case.—The Salvation Army was accustomed to form processions in the streets of Weston-super-Mare. Its object was perfectly lawful, but it was unpopular in the town among a section of the inhabitants, who formed a rival organization called the Skeleton Army. This body paraded the streets at the same time as the Salvation Army, and the result was considerable disturbance and stone throwing in the streets. The Salvation Army were then required by notice not to assemble in the streets to the disturbance of the public peace. However, they disregarded the notice and took out a procession. The leaders were arrested, and they appealed against the order of arrest. The court observed: "what has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and *the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition*" (*c*). Judgment was given for the Salvation Army.

So also it has been observed that "an act innocent in itself, done with innocent intent, and reasonably incidental to the performance of a duty, to the carrying on of business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal way (*d*)."

(*c*) *Beatty* v. *Gillbanks* (1882), 9 Q.B.D. 308.
(*d*) *R.* v. *Justices of Londonderry* (1882), 28 L.R. Ir. 440, p. 450.

Other Cases.—In another case, a magistrate, believing on reasonable and probable grounds that a meeting was held with an unlawful object, dispersed it. When sued for assault, he was unable to prove that the meeting was in fact unlawful, but he proved that he had grounds for his belief. It was held: "Under such circumstances the defendant (the magistrate) was not to defer action until a breach of peace had actually been committed. His paramount duty was to *preserve the peace unbroken,* and that by whatever means were available for the purpose (*e*)."

A Protestant lecturer held meetings in the streets and public places of Liverpool, and attacked the Roman Catholic religion in highly abusive language. In consequence there were breaches of the peace and riots. He expressed an intention to hold more meetings of a similar character. A local Act in force in Liverpool prohibited the use of threatening, abusive or insulting words in the streets which might lead to a breach of the peace. The lecturer was bound over by the magistrate to keep the peace and be of good behaviour. He appealed on the ground that he had not committed any unlawful act by holding meetings in the public streets. Darling J., giving judgment said: "He calls himself a crusader who is going to preach a Protestant crusade. In order to do this he supplied himself with a crucifix, which he waved about . . . . he admittedly made use of expressions most insulting to the faith of the Roman Catholic population . . . . He is one of—

'That stubborn crew
Of errant saints whom all men grant
To be the true church militant ;
A sect whose chief devotion lies
In odd perverse antipathies.'

* * * *

"I think that the natural consequences of the 'crusaders' eloquence has been to produce illegal acts, and that from his acts and conduct circumstances have arisen which justified the magistrate in binding him over to

(*e*) *O'Kalley* v. *Harvey* (1883), 14 L.R. Ir at pp. 109-12.

keep the peace and be of good behaviour." Another judge observed that "the law does regard the infirmity of human temper to the extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct" (*f*).

It will be noted that in this case the lecturer was actually guilty of a breach of law. On the other hand, in *Beatty* v. *Gillbanks,* the Salvation Army was guilty of no illegal act.

Three or more persons.

Unlawful Assemblies.—Whenever three or more persons meet in order to commit a crime by open force, or to accomplish a common purpose, lawful or unlawful, and the circumstances are such that there is reasonable fear, in the minds of firm and courageous neighbours, of a breach of the peace, they are guilty of taking part in an unlawful assembly. This is a misdemeanour punishable with fine and imprisonment. Its essential characteristic is the actual or threatened breach of the peace. It is not necessary that its design should have been put into execution, but the assemblage must have taken place. A prize fight is illegal, and may lead to a breach of the peace. It has accordingly been held that where persons assemble to witness a prize fight, they constitute an unlawful assembly, even though the fight never takes place (*g*). If magistrates or police officers have a reasonable apprehension of an immediate breach of the peace, they may disperse a meeting which has actually assembled for an unlawful purpose. In the eye of the law persons are responsible for the natural consequences of their conduct. "You must look not only to the purpose for which they meet, but also to the manner in which they come, and to the means which they are using" (*h*). An unlawful assembly is not necessarily a gathering met together for the commission of a crime. The object may be absolutely innocent; *e.g.*, to support

(*f*) *Wise* v. *Dunning,* [1902] 1 K.B. 167.
(*g*) *R.* v. *Billingham* (1825), 2 C. & P. 234.
(*h*) *Per* Bayley, J., in *R.* v. *Hunt* 1 St. Tr. (N.S.), 171, 435.

a Parliamentary measure by strictly constitutional means. Yet it will be an unlawful assembly if the persons who take part in it behave in such a way as to create, in the minds of firm and rational men who have families and property to protect, a reasonable apprehension that a breach of the peace will take place (*i*). But as was held in the case of the Salvation Army, if the purpose of a meeting is lawful and its manner peaceful, it does not become an unlawful assembly because its members know that other people are likely to disturb them and to cause a breach of the peace.

Reasonable fear of a breach of the peace in the minds of reasonable men.

An unlawful assembly may be dispersed forcibly, even by private persons acting on their own initiative. But the force used must be in proportion to the necessities of each particular case.

May be dispersed forcibly.

Rout and Riot.—If the members of an unlawful assembly do any act towards carrying out their purpose, the assembly develops into a *rout, e.g.*, if they actually commence walking towards the field where the fight is to come off. The rout will become a *riot* as soon as they forcibly put into effect the unlawful purpose, *e.g.*, as soon as a blow is struck.

Unlawful assembly, rout, and riot are all misdemeanours, punishable with fine and imprisonment. But if the purpose of the rioters is felonious, *e.g.*, arson, then the riot is a felony. The amount of force which may be used in order to suppress a felony is much greater than in the case of a misdemeanour.

It is generally said that in order to constitute a riot, five elements are essential: *firstly*, three or more persons; *secondly*, a common unlawful purpose; *thirdly*, the execution of the common purpose; *fourthly*, an intention to help one another by force if necessary; *fifthly*, force or violence displayed in a manner which alarms

Riot.

(*i*) *R* v. *Vincent*, 9 C. & P. 91.

at least one person of reasonable firmness (*j*). During the Peace Night in 1919, a good-humoured crowd entered an unoccupied house and took away the woodwork to make a bonfire. A next-door neighbour made no attempt to protect the house, but told some of the mob that he hoped they would spare his house. He stated in court that he apprehended injuries if he interfered with the crowd. The court held that the next-door neighbour was a man of reasonable courage; that he had been alarmed; that all the five ingredients of a riot were present; that therefore the conduct of the crowd amounted to a riot (*k*).

Statutory Riot.—The Riot Act, 1715, lays down that whenever an unlawful assembly of *twelve* or more persons do not disperse within an hour, after a justice of the peace has read, or endeavoured to read, to them a proclamation (*l*) under the Riot Act calling upon them to disperse, they are no longer merely guilty of a misdemeanour but of a felony. The maximum punishment for this is penal servitude for life. But a prosecution for it cannot be commenced after the lapse of a year from its commission. If the statutory proclamation has not been made, a riot will be still a riot, though not under the Riot Act but under the common law.

Twelve or more persons.

The Act expressly indemnifies any person who, after the expiry of the statutory hour, may have to use violence against the rioters. But even while the hour is still unexpired the common law right of dispersion with a moderate degree of force still exists. If the rioters should proceed to commit any felonious violence, the same extreme measures of force may be employed for the protection of person and property as if the statutory hour had already expired. The Army Regulations provide that if a magistrate is present, the officer in

(*j*) *Field* v. *The Receiver of the Metropolitan Police*, [1907] 2 K.B. 853.

(*k*) *Ford* v. *Receiver for the Metropolitan Police*, [1921] 2 K.B. 344.

(*l*) Absurdly enough, this is popularly known as reading the Riot Act.

command of troops should not fire without the magistrate's order, but if no magistrate is present, the officer need not wait for one before taking active steps to prevent outrage upon person or property.

Indeed, the matter is not one of right merely, but of duty. Any person may be called upon by a justice of the peace or by a constable to assist in suppressing a riot. A still greater duty rests upon a justice of the peace. He must proceed to the scene of a riot, and read the statutory proclamation if circumstances require its reading, and take such other steps to disperse the rioters as may be necessary. If he fail to do so, he is guilty of criminal neglect of duty.

Lawful Public Meetings.—It is now provided that any one who at a lawful public meeting, acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together, is guilty of an offence which may be punished summarily. The offence is more serious if it occurs at a political meeting during a Parliamentary election (*m*).

Tumultuous Petitioning.—By an Act of the reign of Charles II, no persons above the number of ten may proceed to His Majesty or both Houses or either House of Parliament upon the pretence of delivering any petition or complaint. The penalty for tumultuous petitioning is a fine up to £100 or three months' imprisonment. But the offender must be tried within six months after the offence has been committed.

Private Premises and the Police.—In a recent case (*n*) for the first time in English legal history, it has been established that police officers are entitled to enter and to remain on private premises if they have reasonable grounds for believing that if they are not present an offence or breach of the peace will be committed there.

A private hall was hired by one Fred Thomas for a meeting which the public were invited to attend to protest against the Incitement to Disaffection Bill, which was then before Parliament. Three police officers presented

(*m*) Public Meetings Act, 1908.
(*n*) *Thomas* v. *Sawkins*, [1935] 2 K.B. 249.

themselves for admission to the meeting, and when permission was refused by the organizers they entered the hall and seated themselves in the front row. On further request, they refused to leave the hall. It was held that a police officer may enter and remain "on private premises" when he reasonably believes that an offence *will be committed,* if he is not present. The court based its decision on the statement in Stone's Justices Manual that a constable may break into a house to suppress an affray. "If he can do that", said Avory J., "I cannot doubt that he has a right to break in to prevent an affray which he has reasonable cause to suspect may take place on private premises."

This is a fundamental issue. On a superficial view of the case, it may seem unreasonable to say that a police officer cannot take steps to prevent an act which, when committed, becomes a punishable offence. But this distinction between prevention and punishment is one of vital importance. It is on this distinction that freedom of speech, freedom of public meeting, and freedom of the press are founded. For Dicey the pervading principle of English law is "that men are to be interfered with or punished, not because they may or will break the law, but only when they have committed some definite assignable legal offence" (*o*). Can the present judgment be reconciled at all with this pervading principle?

(*o*) *Law of the Constitution* pp. 244-245.

PART VI

THE CHURCH

CHAPTER I. THE CHURCH OF ENGLAND.

CHAPTER I

THE CHURCH OF ENGLAND

Church and State.—The Church of England is established by law, and is an essential part of the state. The clergy must accept certain fundamental tenets which are prescribed by statute (*a*) and the services of the Church are governed by the Book of Common Prayer which also rests on statutory authority (*b*). The Sovereign is the supreme governor of the realm in all matters spiritual and temporal. But he is not a minister of the Word.

Church Organisation.—There are two provinces in England, Canterbury and York. Both are under Archbishops. The Archbishop of Canterbury is Primate of All England. The provinces are divided into dioceses in charge of bishops. These are sub-divided into archdeaconries, deaneries and parishes. The King appoints the archbishops and bishops on the recommendation of his Prime Minister. Twenty-four bishops, in addition to the two Archbishops, have seats in the House of Lords. But they cannot claim, as the lay Lords can, to be tried by their peers. Several other appointments rest with the King. Clergymen must take holy orders which are conferred by the bishops, and are precluded from sitting in Parliament. But holy orders can be given up.

Church Law.—The law of the church is a part of the law of the land, and courts take judicial notice of it. The ecclesiastical courts are courts properly so called, and the ordinary courts exercise control over them through the prerogative writs. Their decrees are enforced by the state. The Church may legislate for itself through the House of Convocation and the House of Laymen. Their measures are submitted to the two Houses of Parliament, and, if confirmed by them by resolution, are sent up to the King for his assent. On receipt of this, they have statutory force.

(*a*) Clerical Subscription Act, 1865.
(*b*) Act of Uniformity, 1558, which was slightly modified in 1872.

The Archbishops.—The Archbishop of Canterbury is the Primate and takes precedence over the Archbishop of York, who is not his subordinate. He can grant dispensations to marry at any time and place as the Pope did in former times. It is for him to crown the King, but it is said that the Archbishop of York has the right to crown the Queen. The latter archbishop has duties similar to those of the Archbishop of Canterbury. Both can sit, if they choose, to hear ecclesiastical appeals in the Judicial Committee of the Privy Council.

Bishops.—The duties of a bishop are numerous and varied. He ordains priests, helps the archbishop to consecrate other bishops, licenses churches and other buildings for public worship, consecrates churches and graveyards, and performs several other duties. Bishops sit in rotation in the Judicial Committee of the Privy Council to hear appeals relating to church matters. They have a right to visit all the clergy in their dioceses, and may preach in any diocesan church. They decide whether the clergy shall be proceeded against by the Church courts. They also supervise examinations for candidates for holy orders.

PART VII

THE EMPIRE

CHAPTER I. THE EMPIRE.

II. THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Chapter I

THE EMPIRE

The British Empire.—The constitutional structure of the British Empire in all its ramifications is an extensive study in itself. Here, it will be sufficient to refer to some of its important aspects in bare outline. The term British Empire stands for the territories over which the King exercises sovereignty or some control similar to sovereignty. These are spread over different parts of the world, and include autonomous units, semi-autonomous units, colonies, protectorates, mandated territories, etc. The term British Commonwealth of Nations is also frequently used in the same sense as the British Empire, but is more appropriately applied to the United Kingdom and the self-governing Dominions.

The Dominions.—Following the doctrines stated by Blackstone it was said in the middle of the eighteenth century that Great Britain "hath, and of right ought to have full power and authority to make laws and statutes of sufficient power and validity to bind the colonies and people of America, subjects of the Crown, in all cases whatever." Since that time the British Empire has changed a great deal. The United States no longer form part of it, and during the present century and the last, beginning with Canada, colony after colony has been transformed into a self-governing Dominion. Throughout this period, there was a steady decline in the use of the powers of the British government with regard to the Dominions. But so far as legal relations were concerned, the apparatus of control remained unchanged. The law did not keep pace with constitutional fact, and the Empire was perhaps the most anomalous system of juridical and political organization known to history. In 1915, Dicey (*a*) summed up the legal position in the following words: "No lawyer questions that Parliament could legally abolish any colonial constitution or that Parliament can at any moment legislate for the colonies and repeal or override

18th Century doctrine.

Dicey in 1915.

(*a*) *Law of the Constitution*, pp. 109-110.

any colonial law whatever. Parliament moreover does from time to time pass Acts affecting the colonies, and the colonial, no less than the English, Courts completely admit the principle that a statute of the Imperial Parliament binds any part of the British dominions to which the Statute is meant to apply . . . . . If an Act of the New Zealand Parliament contravenes an imperial statute it is for legal purposes void, and if an Act of the New Zealand Parliament, though not infringing upon any statute, is so opposed to the interests of the Empire that it ought not to be passed, the British Parliament may render the Act of no effect by means of an imperial statute."

Dicey here laid down sound legal doctrine, and in theory an Act of the British Parliament could abolish the legislature of any Dominion. But certain colonies had become self-governing Dominions and their status rested more on convention than on law (*b*). And if we look from legal theory to actual life, from constitutional dogma to constitutional practice, things are found to be very different. In 1921, the Canadian Prime Minister could rightly declare that no such Act of Parliament would be contemplated by any ministry in England, and, if contemplated, would never be enacted, and if enacted would never be obeyed by the Dominion concerned (*c*). The form of Blackstone's law survived. Its spirit and force had definitely departed.

But some colonies had become Dominions.

Theory and practice differ.

Recent History.—During the Great War, Dominion representatives sat in the Imperial War Cabinet. Except for one Dominion they were represented on the Peace Delegation at Paris. They became separate members of the League of Nations, and separate signatories to the treaties which concluded the Great War.

In 1922 the Irish Free State was constituted a Dominion. In the following year, Canada was intensely

(*b*) At present the Dominions are the Dominion of Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, the Irish Free State, and New Foundland (*vide* Statute of Westminster, 1931).

(*c*) See *Cambridge Law Journal*, 1925, p. 158.

dissatisfied over the mode of concluding the Treaty of Lausanne without Dominion representation. Soon after a nationalist government came into office in the Union of South Africa. The Irish Free State and Canada sent a separate political representative, according to the respective requirements of each, to the Vatican, Washington, and other capitals. Canada set up the doctrine that a treaty which affects only one Dominion should be signed by that Dominion's representative alone. In 1926, the Governor-General of Canada refused a dissolution in circumstances, under which it is said, the King would have granted a dissolution to a British government. Several factors thus combined to demand a revision of the Dominions' position. In 1926 the United Kingdom and the Dominions were declared, in the famous words of Lord Balfour at the Imperial Conference of 1926, to be *"autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations"* (*d*). The principle underlying the declaration was passed into law in 1931.

Separate diplomatic agents.

Balfour's formula.

(*d*) The following are other descriptions of the self-governing part of the Empire, from different sources but substantially the same :—

1. "The colonies (are) co-ordinate members with each other and with Great Britain of an empire united by a common legislative sovereign."
2. "The Britannic dominions constitute an imperial state consisting of many separate governments, in which no single part, though greater than any other part, is by that superiority entitled to make laws for the lesser part."
3. "So many different governments perfectly independent of one another. This is the only clear idea of their real present situation. Their only bond of union is the King."
4. "All members of the British Empire are distinct states, independent of each other, but connected together under the same sovereign, in right of the same crown."
5. (The King is the) "common sovereign, who is thereby made the central link, connecting the several parts of the empire".

Kennedy, *Essays in Constitutional Law*, pp. 19-20.

The Statute of Westminster, 1931.—This Act did not deny the unqualified power of the British Parliament, but it did lay down constitutional principles which have far-reaching consequences regarding its exercise. *Firstly,* the Colonial Laws Validity Act, 1865 (*e*), is no longer to apply to Dominion legislation, and therefore no Act is to be considered invalid because it is repugnant to the law of England or to the provisions of any existing or future Act of the Imperial Parliament. *Secondly,* a Dominion may repeal or amend any such Act which is part of the law of the Dominion. *Thirdly,* an Act of Parliament passed after December 11, 1931, shall not extend to a Dominion as part of the law in force in that Dominion, unless it is expressly declared in that Act that the Dominion has requested, and consented to, its enactment. *Fourthly,* a Dominion Parliament has full authority to pass laws having extraterritorial operation, *e.g.,* laws punishing bigamy committed abroad. *Fifthly,* a Dominion Parliament is free to legislate regarding merchant shipping, and the restrictions imposed by former legislation (*f*) are not to apply to such legislation. Formerly Dominions did not have adequate control even over ships registered in foreign countries which entered Dominion ports. Now, each Dominion has complete legislative control over its own ships, wherever they may be, subject only to the rules of international law. Over foreign ships and ships registered in other parts of the British Empire, a Dominion now has the same control as any sovereign state may exercise over such ships. Also, it has complete freedom to regulate its own coastal trade. *Sixthly,* the Dominions may now regulate the practice and procedure of Colonial Courts of Admiralty themselves.

• **After the Statute.**—To-day the one powerful bond which unites the Dominions and the United Kingdom is the Crown. The King is one throughout the British

(*e*) Under this Act, colonial legislation was valid even if it went counter to English common law, but was invalid if it was contrary to an Act of the Imperial Parliament intended to apply to the colony concerned.

(*f*) Merchant Shipping Act, 1894.

Empire. There is not one King of the United Kingdom, another King of Canada (*g*). The Crown is the supreme executive in the United Kingdom and in all the Dominions, but it acts on the advice of different ministers within different constitutional units. "The King", it has been remarked, "acting on the advice of the British Government can no more contract for the Irish Free State than can the King of Italy or the Mikado of Japan" (*h*). Thus though there is but one Crown, the different governments of the Empire are mutually exclusive. "If the British Government, by one of His Majesty's Ministers were to enter into possession of a portion of the South Australian public lands, contrary to South Australian laws, His Majesty's Minister would be liable to be dispossessed by writ of intrusion at the suit of the State of South Australia, just as any other intruder would be liable" (*i*).

One King throughout the Empire.

But different governments.

The difficulty involved in the situation is that circumstances may arise when ministers of one Dominion tender advice to the Crown which is in sharp conflict with the advice tendered by ministers of another Dominion. The powers of the Crown are actually exercised in a Dominion by the Governor-General. He does not now represent the government of the United Kingdom in any sense. In fact, the new convention is that a Governor-General shall be appointed only on the advice of the ministers of the Dominion concerned. Though some Dominions have their own representatives in certain foreign countries, for the most part, the Dominions make use of the diplomatic and consular services of the United Kingdom. They are separate members of the League of Nations. But they are not persons at international law. Thus if the Crown declares war on a foreign

Dominion Governors-General now appointed on the advice of Dominion ministers.

(*g*) *Williams* v. *Howarth*, [1905] A. C. 551.
(*h*) *Per* Mr. P. McGilligan, Dail Eireann, July 16, 1931.
(*i*) *State of South Australia* v. *State of Victoria* (1911), 12 Commonwealth Law Reports, at p. 711.

country, a Dominion which takes no part in actual hostilities cannot be treated as a neutral.

Irish Free State.—Mention may be made of the peculiar position of the Irish Free State. The constitutions of all other Dominions rest upon Acts of the Imperial Parliament. The case of the Irish Free State is unique. "Constitutionally," says Professor Keith, "the most interesting aspect of the Irish Settlement is the fact that the Irish Free State owes its existence as a Dominion to a formal treaty between duly authorized representatives of His Majesty's Government and plenipotentiaries representing Sinn Fein (the rebel party). There is, of course, no precedent for such a position in the earlier history of the Empire . . . The closest parallel to one side of the transaction is the treaty of peace with the revolting colonies in 1783, for by it the Imperial Crown conceded the national status and sovereignty of these States which it had hitherto denied, and similarly the Treaty of December 6, 1921, constitutes a recognition of Irish sovereignty" (*j*). In the House of Commons objections were raised to the use of the term 'treaty': "With whom can we make a Treaty? Only with an independent State. Nobody has ever heard of a treaty being made, shall I say, with Scotland since it became part of the United Kingdom. We cannot make a Treaty with New Zealand" (*k*). The Prime Minister (Mr. Lloyd George) who was the principal British negotiator in the Irish settlement, spoke in non-technical but emphatic terms. "My right honourable Friends and I", he said, "have signed a document —a Treaty between the people of this country and the people of Ireland" (*l*).

Irish Free State created by treaty.

• The constitution of the Free State provided for constitutional amendment. Under these provisions and under the Statute of Westminster, several constitutional innovations were made, including the repeal of the appeal to the Judicial Committee of the Privy

Constitutional amendments.

(*j*) *Journal of Comparative Legislation*, Vol. 4, p. 104.
(*k*) Sir F. Banbury, *Hansard*, Vol. 151, Col. 604.
(*l*) *Hansard*, Vol. 150, Col. 52.

Council, the repeal of the oath of allegiance to the King, and the abolition of the office of Governor-General. In 1937, the name of the State was changed to Eire, and a new constitution passed by its legislature replaced the constitution of 1922.

India.—India consists of Indian States and British India. The former are protected states under the paramountcy of the British Crown, based partly on treaties and partly on usage and sufferance. The theory is that the sovereignty of these states is shared between the British Crown and the Indian Princes. In working practice, it is not possible for the latter to disregard directions received from representatives of the Crown. Paramountcy, it is said, must be paramount.

Indian States.

British India is governed by a Governor-General who is also Viceroy. In addition, he now holds the office of Crown Representative, and in this capacity, deals with the rulers of Indian States. There is an executive council and a legislature with two chambers. The Government of India functions under the direction of the Secretary of State for India, who is responsible to Parliament. The late Mr. Montague described it as "a subordinate branch of the British Government, 6,000 miles away". The Governor-General's Executive Council is not a cabinet, and is not responsible to the legislature. There are some subjects, *e.g.*, the army budget, on which the legislature may not vote. Under certain cricumstances the Governor-General may 'certify' expenditure or legislation which the legislature declines to pass. He may also issue ordinances which have the force of law for a period of six months. The High Courts have only provincial jurisdiction, and appeal lies from them to the Privy Council. But in cases involving constitutional issues, appeal lies in the first instance to the Federal Court.

British India.

Federation.—The two basic features of the new constitution (*m*) are federation and provincial autonomy. The Act, while it does not by itself establish federation,

(*m*) Government of India Act, 1935.

provides for a federation of Provinces and Indian States. The Federal Executive and Provincial Executives will exercise independently the powers vested in them. The Federal Legislature will be bicameral.

Election to the lower chamber will be by the indirect method. British Indian members will be elected by members of the Provincial Legislatures. In the upper chamber, there will be direct election, but on a very restricted franchise. In both chambers, the representatives of Indian States will be nominated by their respective rulers. The Governor-General will normally act upon ministerial advice, choosing his ministers from the Legislature. But foreign affairs, defence, tribal areas and ecclesiastical affairs are reserved subjects. For their administration the Governor-General is solely responsible. But he may appoint three counsellors to assist him. British Baluchistan will also be excluded from the operation of ministerial advice.

Governor-General.

In the exercise of his "special responsibilities" with which he is charged under the Act, he may disregard the advice of his ministers even in the ministerial sphere, *e.g.*, in order to maintain the peace and tranquillity of the country, to safeguard its financial stability, to protect the interests of minorities, public services and the Indian States, or to prevent commercial discrimination against the United Kingdom. The Governor-General has full powers in the event of a break-down of the constitution to carry on the government of the country.

Special responsibilities.

Constitutional break-down.

Dyarchy is to be a feature at the centre but it disappears from the Provinces, which under the Act have become autonomous units. Normally, the exercise of all governmental functions, including law and order, is to be on the advice of ministers, who are responsible to the legislatures. The Governors have certain "special responsibilities" similar to those of the Governor-General. But a convention is growing up that even in respect of these responsibilities the advice of ministers must prevail. The provincial legislatures are elected by direct vote.

Provincial autonomy.

The Federal Court is to interpret the constitution and agreements to be made by the Federation and its units. Its jurisdiction may be extended by the Central Legislature to make it a Supreme Court of appeal in civil cases from the Provincial High Courts. In case of either jurisdiction, there is a right of appeal, sometimes with leave only, to the Judicial Committee of the Privy Council.

Federal Court.

The Act contains no power of constitutional amendment which continues to lie in the hands of the Imperial Parliament.

No power of constitutional amendment.

Colonies.—Colonial constitutions display great variety. But they must be distinguished from the constitutions of the self-governing Dominions. The legislative supremacy of Parliament extends to the colonies, the Crown can disallow colonial legislation, and in the case of the great majority of the colonies, it can legislate by prerogative.

A *settled colony* is a place to which British settlers have resorted, and which at the time of settlement was uninhabited or had no organized government. The settlers take the common law and statute law of England with them to such a colony, so far as these laws are applicable to an infant community. A statute made after the foundation of the settlement does not apply to it, unless it contains an express direction to that effect.

A *conquered colony* becomes subject to the King and to the legislation of Parliament, but its original laws continue to exist till they are altered. When the King grants a legislature to a conquered or ceded colony, he ceases to exercise his power of legislation by order-in-council, unless this power is expressly reserved.

A *ceded colony* is practically in the same position as a conquered colony. But the treaty of cession may, in some cases, place the inhabitants in a better position than they would be in case of conquest.

Colonies may again be classified as those possessing responsible government and those without it.

Self-governing Colonies.—Malta acquired a certain degree of self-government in 1921, and the Maltese Parliament enjoys limited authority, all matters of imperial interest being outside its jurisdiction. On these reserved subjects, the Governor may legislate by ordinance, or the Crown by order-in-council. For all matters entrusted to Parliament, the Governor is assisted by an executive council of ministers. The constitution provides that the relations of this council to the Governor shall be the same as those of ministers in the United Kingdom to the King. For reserved matters the Governor has a nominated council. Whenever there are any issues not exclusively ministerial, he may summon a meeting of the two councils as a Privy Council to consider them.

Malta.

Southern Rhodesia was given responsible government in 1923. There is but one legislative chamber, and the suffrage excludes most of the native population.

Since 1930, Ceylon has had a constitution under which there is a legislature of fifty members. It is elected on a wide franchise which extends to women. It legislates, and, in addition, administers through committees. Normally the Governor acts on the advice of the committees, but he is not bound to do so. He has reserved powers of legislation and may take over any department, *e.g.*, police, after declaring a state of emergency. The committees are elected by the legislature and receive assistance from three nominated officers as advisers, not as controllers. Ministers are to resign if the budget is rejected, or a direct vote of censure is passed. If the constitutional scheme does not work, the Governor may take over any department. He attends to all questions of defence, foreign relations and the interests of British subjects not permanently resident in Ceylon.

Ceylon.

The Crown Colonies.—In Crown colonies, whether there is a legislature or not, the executive government is effectively under the control of the Governor appointed by the Imperial Government. Such colonies vary greatly in their governmental organization. Some colonies are without a legislature at all. In others, elected members

sit along with nominated members in the legislature, and the official block is in a majority. In others again, though there are nominated members, there is no official majority. The Crown's right to legislate by order-in-council, and the device employed in some colonies of placing on the executive council representatives of the legislature effectively prevent the possibility of deadlocks, and legislation desired by the Imperial Government or by the Governor is passed without difficulty.

Governors.—The Governor of a colony is appointed by the Crown and all prerogative powers necessary for colonial government are delegated to him. He is not a Viceroy, and can therefore be sued in England or in his colony for liabilities incurred in his colony or elsewhere and for all wrongful acts ordered by him as Governor. For his official acts he must prove his legal authority, and cannot excuse himself by giving the defence of an 'act of state'(*n*). He does not possess general sovereign power. If he commit a tort in his colony he may be sued for it in England provided that the fact in question is a tort in England, and provided that a colonial Act of Indemnity does not protect him (*o*). He is also liable to a criminal prosecution in England for any acts of oppression or crime committed by him in his colony. But such cases have not been brought in recent years.

In a Crown colony the Governor is the centre of all authority. His assent is necessary for legislation, and he reserves certain Bills. The prerogative of mercy is exercised by him. He is the final sanctioning authority for the issue of public funds. He summons, prorogues, and dissolves the legislature.

Protectorates.—Strictly speaking, a protectorate is not part of the British Empire. Some protectorates are governed like colonies. Others are semi-independent. They have accepted British protection under varying degrees of consent. British North Borneo enjoys a fair degree of autonomy. Bechuanaland is governed as a colony. But all protectorates must cease to have independent foreign relations, and their inhabitants are

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(*n*) *Musgrane* v. *Pulido* (1879), 5 App. Cas. 102.
(*o*) *Phillips* v. *Eyre*, (1870), L.R. 6 Q.B. 1.

legally not British subjects (*p*). The Crown legislates for these territories by order-in-council(*q*). In certain protectorates indirect rule is being tried: the native Chiefs function under the advice and direction of British officials. Since a native inhabitant of a protectorate is not legally a British subject, the Crown can deal with him by an act of state. So, when an African Chief in Bechuanaland applied for a writ of *habeas corpus,* it was refused. The justification offered for the decision was that the "Protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous"(*r*).

Mandated Territory.—Mandated territories are colonies of the ex-enemies of the United Kingdom, and their administration is assigned to the Crown by the League of Nations by means of a Permanent Mandates Commission. The League is expected to supervise the administration, and receives an annual report from mandatory powers. The Crown legislates for these territories by order-in-council under the Foreign Jurisdiction Acts. Mandated territories are not, properly speaking, British territory, and their inhabitants do not become subjects of the Crown in the proper sense of the term. But it has recently been held by the Supreme Court of South Africa that a breach of obedience owed to the Crown by the inhabitants of a mandated territory exposes him to the penalties of treason (*s*).

(*p*) *R.* v. *Crewe, ex parte Sekgome,* [1910] 2 K.B. 576.
(*q*) Under the Foreign Jurisdiction Acts, 1890 and 1913.
(*r*) *Per* Vaughan Williams, L. J. in *R.* v. *Crewe, ex parte Sekgome,* [1910] 2 K.B. 576.
(*s*) *R.* v. *Christian* (1924), A.S. A.D. 101.

CHAPTER II

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The Judicial Committee.—The Judicial Committee of the Privy Council is the final Court of Appeal for all the King's lands outside the United Kingdom. It also hears appeals from the ecclesiastical courts in England and the prize courts throughout the Empire. The matters which come before it are of the most miscellaneous character, and the world has never seen another tribunal with powers which range over such a wide field.

Variety of laws.

It has to administer Hindu law, Mohammedan law, French law, Dutch law, English law and other laws. It has often to decide whether the legislative Acts of a colony are valid or invalid, whether they are repugnant to any statute of the Imperial Parliament applicable to such colony. The Statute of Westminster, 1931, has however abolished the doctrine of repugnancy in the case of the Dominions. Essentially, the Judicial Committee is an Imperial and not a British court. It is made up of lawyers of eminence drawn from different parts of the Empire (*a*). Its location in London is convenient, but in no sense essential. This committee is practically a court of law, but in some respects administrative forms are kept up (*b*). Technically, its decisions are not judgments, but only advice to the King, on the strength of which an order-in-council is made, affirming or reversing the judgment of the court, against which appeal has been heard. Only one opinion is

Administrative forms.

(*a*) The Committee consists of all members of the Privy Council who have held high judicial office. These include the seven Lords of Appeal in Ordinary. There are two members eminent for learning in Indian Law. India contributes to their salary. In addition, there are judges and ex-judges, not exceeding seven in number, from the superior courts of the Dominions or the colonies who are Privy Councillors, and not more than two judges or ex-judges of a High Court in British India who are Privy Councillors. Two other Privy Councillors may be appointed, with no restriction as to qualifications.

(*b*) See note at the conclusion of this chapter.

recorded, and secrecy is maintained. The minority opinion is ignored. This feature is a relic of early times when judicial and administrative functions were intimately blended, and the King received advice on judicial business and matters of state from the same council. But it must be borne in mind that in the handling of appeals, the Committee's action must be strictly judicial and not governed by any consideration of policy (*c*).

Forms of Appeal.—Appeal may lie as of right when certain conditions as to value are fulfilled, or by special leave. This leave may be granted by the court below or in case of refusal, by the Judicial Committee itself. Apart from statutory prohibition this leave is always given by the Committee whenever any point of importance is involved. Appeals in criminal matters are not heard, unless there has been a flagrant violation of natural justice or a grave departure from the forms of legal process. Recently an appeal was allowed from the decision of a court in Ashanti, where a judge, sitting without a jury, sentenced a man to death for murder without considering the possibility that the offence of the accused may have been merely manslaughter (*d*). An appeal from India succeeded on the ground that a member of the jury did not understand the language in which the trial was conducted (*e*). From certain Dominions appeal only lies by special leave of the Committee. The Crown may refer any matter to the Committee for opinion, as happened in the case of the boundary dispute between Canada and Newfoundland over Labrador (*f*).

The Future of Appeals.—For some years legal opinion in the Irish Free State and certain other Dominions has regarded appeals to the Judicial Committee as a limitation upon their autonomy and a slur upon their judges (*g*). Lord Haldane laid down that the Judicial

(*c*) On this point, see the extract from the judgment of Lord Haldane in *Hull* v. *M'Kenna* (1926), I.R. 402, given in the note at the end of the present chapter.

(*d*) *Knowles* v. *The King*, [1930] A. C. 366.

(*e*) *Ras Behari Lal* v. *The King-Emperor* (1935), W.N. 207.

(*f*) *In re Labrador Boundary* (1927), 43 T.L.R. 289.

(*g*) "The Privy Council, it is true, is a question of great difficulty and has been the cause of some bitter and acrimonious words at various times in the Irish Free State"—Solicitor-General's speech, House of Commons, November 20, 1931.

Committee, in granting leave to appeal, must be guided by the wishes of the Dominion concerned (*h*). Professor Keith thinks that appeals from the Dominions are likely to disappear gradually. "It seems", he wrote, referring to the Irish Free State, "that if the pressure continues the appeal must be renounced formally as it probably has been in practice. It is clearly inconsistent with autonomy, if that is pressed to its logical conclusion, and, while the other Dominions may not deem it wise or desirable thus to stress the point, they cannot be held to fetter the action of a Dominion that entertains a strong dislike to the Court" (*i*). The Statute of Westminster has abolished the doctrine of repugnancy regarding Dominion legislation. The Dominions are therefore now legally free to abolish the appeal, and action to this effect has already been taken by the Irish Free State, now known as Eire, in respect of all appeals (*j*) and by Canada in respect of criminal appeals (*k*). The Judicial Committee has upheld the validity of the legislation passed by the Dominions in this connection and observed that they "can now pass Acts repugnant to an Imperial Act. In this case they have done so" (*l*). The abolition of appeals has caused resentment, and there is no doubt that the Parliament responsible for the Statute of Westminster cannot limit the powers of its successors. Parliament makes laws. It can also repeal them. Yet if law rests on general recognition and acceptance, the Statute of 1931 has declared a principle far more binding than any mere legislative enactment.

Tendency to abolish the appeal.

(*h*) *Hull* v. *M'Kenna*, [1926] I.R. 402.

(*i*) *The Sovereignty of the British Dominions*, p. 262.

(*j*) The Constitution Act, 1937, article 34(4). Constitution (Amendment No. 22.) Act 1933.

(*k*) Criminal Code Amendment Act of Canada, 1933.

(*l*) *Per* Lord Sankey, L.C. in *Moore* v. *The Attorney-General for the Irish Free State*, [1935] A.C. 484.

Note.—The following judicious observations by Lord Haldane (*m*) on the question of appeals to the Privy Council merit close attention:—

Judicial Committee is essentially a court.

"We are not Ministers in any sense; we are a Committee of Privy Councillors who are acting in the capacity of judges, but the peculiarity of the situation is this: It is a long standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit. We have nothing to do with policies, or party considerations; we are really judges, but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgment himself, and always acts upon the report which we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in a printed form. It is a report as to what is proper to be done on the principles of justice; and it is acted on by the Sovereign in full Privy Council; so that you see, in substance, what takes place is a strictly judicial proceeding.

"That being so, the next question is: what is the position of the Sovereign sitting in Council in giving formal effect to our advice, and what are our functions in advising him? The Judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or, for the future an Irish Free State body. There sit among our members Privy Councillors who may be learned judges of Canada—there was one sitting with us last week—or from India, or we may have the Chief Justice, and very often have had others, from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the Law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India, as he

(*m*) *Hull* v. *M'Kenna*, [1926] I.R. 402.

may sit here, and it is only for convenience, and because we have a court, and because the members of the Privy Council are conveniently here that we do sit here; but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial Court which represents the Empire, and not any particular part of it. It is necessary to observe what effect that has upon the present situation. The Sovereign, as the Sovereign of the Empire, has retained the prerogative of justice, but by an Imperial Statute to which he assented, that was modified as regards constitutional questions in the case of Australia. That is the only case that I need refer to where there has been any modification.

An Imperial Court.

"In Ireland, under the Constitution Act, by Art. 66, the Prerogative is saved, and the Prerogative therefore exists in Ireland, just as it does in Canada, South Africa, India, and right through the Empire, with the single exception that I have mentioned—that it is modified in the case of the Commonwealth of Australia in reference to, but only in reference to, constitutional disputes in Australia. That being so, the Sovereign retains the ancient Prerogative of being the supreme tribunal of justice; I need not observe that the growth of the Empire and the growth particularly of the Dominions, has led to a very substantial restriction of the exercise of the Prerogative by the Sovereign on the advice of the Judicial Committee. *It is obviously proper that the Dominions should more and more dispose of their own cases,* and in criminal cases it has been laid down so strictly that it is only in most exceptional cases that the Sovereign is advised to intervene. In other cases the practice which has grown up, or the unwritten usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if, in their Lordships' opinion, the question is one that can best be determined on the spot, then the Sovereign is not, as a rule, advised to intervene, nor is he advised to intervene normally—I am not laying down precise rules now, but I am laying down the general principles—unless the case is one involving some great principle or

Dominions should dispose of their own cases.

is of some very wide public interest. It is also necessary to keep a certain discretion, because when you are dealing with the Dominions you find that they differ very much. For instance, in States that are not unitary States—that is to say, States within themselves—questions may arise between the central Government and the State, which, when an appeal is admitted, give rise very readily to questions which are apparently very small, but which may involve serious considerations, and there leave to appeal is given rather freely. In Canada there are a number of cases in which leave to appeal is granted because Canada is not a unitary State, and because it is the desire of Canada itself that the Sovereign should retain the power of exercising his Prerogative; but that does not apply to internal disputes not concerned with constitutional questions, but relating to matters of fact. There the rule against giving leave to appeal from the Supreme Court of Canada is strictly observed where no great constitutional question, or question of law, emerges. In the case of South Africa, which is a unitary State, counsel will observe that the practice has become very strict. We are not at all disposed to advise the Sovereign, unless there is some exceptional question, such as the magnitude of the question of law involved, or it is a question of public interest in the Dominion to give leave to appeal. It is obvious that the Dominions may differ in a certain sense among themselves. For instance, in India leave to appeal is more freely given than elsewhere, but the genesis of that is the requirements of India and the desire of the people of India. In South Africa, we take the general sense of that Dominion into account, and restrict the cases in which we advise His Majesty to give leave to appeal. It becomes with the Dominions more and more or less and less as they please. We go upon the principles of autonomy on the question of exercising the discretion as to granting leave to appeal. It is within the Sovereign's power, but the Sovereign, looking at the matter, exercises this discretion."

Leave to appeal must be granted according to the Dominion's wishes.

APPENDICES

APPENDIX A

FORM OF SUMMONS TO A PRIVY COUNCIL

Let the Messenger acquaint the Lords and others of His Majesty's Most Honourable Privy Council, That a Council is appointed to meet at the Court at Buckingham Palace, on the Day of this Instant, at of the Clock.

APPENDIX B

FORM OF SUMMONS TO A MEETING OF THE CABINET

A Meeting of His Majesty's Servants will be held at 10, Downing Street at o'clock on
the
which
is desired to attend.

10, Downing Street

APPENDIX C

FORM OF FRFE PARDON

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith. To all to whom these Presents shall come, Greeting!

WHEREAS A. B. was convicted of and was thereupon sentenced to .

Now Know Ye that We in consideration of some circumstances humbly represented to Us are graciously pleased to extend Our Grace and Mercy to the said A. B. and to grant him Our Free Pardon in respect of the said conviction, thereby pardoning, remitting and releasing unto him all pains penalties and punishments whatsoever that from the said conviction may ensue; and We do hereby command all Judges, Justices and others whom it may concern that they take due notice hereof; and We do require and direct our Prison Commissioners and the Governor of any Prison in which the said A. B. may be detained in respect of the said conviction to cause him to be forthwith discharged therefrom;

And for so doing this shall be a sufficient Warrant.

Given at Our Court at St. James's, the day of 19 in the year of Our reign.

By His Majesty's Command.

APPENDIX D

APPOINTMENT OF AMBASSADOR

GEORGE R. I.

GEORGE, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India, etc., etc., etc.

To All and Singular to whom these Presents shall come, Greeting !

Whereas it appears to Us expedient to nominate some Person of approved Wisdom, Loyalty, Diligence, and Circumspection to represent Us in the character of Our Ambassador Extraordinary and Plenipotentiary to

Now Know Ye that We, reposing especial trust and confidence in the discretion and faithfulness of Our (Right) Trusty and Well-beloved (Counsellor) (Sir).................... have nominated, constituted and appointed, as We do by these Presents nominate, constitute and appoint him the said
to be our Ambassador Extraordinary and Plenipotentiary to

as aforesaid. Giving and Granting to him in that character all Power and Authority to do and perform all proper acts, matters, and things which may be desirable or necessary for the promotion of relations of friendship, good understanding and harmonious intercourse between Our Realm and

and for the protection and furtherance of the interests confided to his care; by the diligent and discreet accomplishment of which acts, matters and things afore-mentioned he shall gain Our approval and show himself worthy of Our high confidence,

And We therefore request all those whom it may concern to receive and acknowledge Our said

as such Ambassador Extraordinary and Plenipotentiary as aforesaid and freely to communicate with him upon all matters which may appertain to the objects of the high Mission whereto he is hereby appointed.

Given at Our Court of Saint James's, the day of
in the Year of Our Lord One Thousand Nine Hundred and Thirty
, and in the Year of Our Reign.

By His Majesty's Command.

(Countersigned by One of His Majesty's Principal Secretaries of State).



APPENDIX E

PATENT FOR CREATION OF A PEER

GEORGE THE SIXTH by the Grace of God of Great Britain Ireland and the British Dominions beyond the Seas King Defender of the Faith To all Lords Spiritual and Temporal and all other Our Subjects whatsoever to whom these Presents shall come Greeting Know Ye that We of Our especial grace certain knowledge and mere motion do by these Presents advance create and prefer Our to the state degree style dignity title and honour of Baron of in Our County of And for Us Our heirs and successors do appoint give and grant unto him the said name state degree style dignity title and honour of Baron to have and to hold unto him and the heirs male of his body lawfully begotten and to be begotten Willing and by these Presents granting for Us Our heirs and successors that he and his heirs male aforesaid and every of them successively may have hold and possess a seat place and voice in the Parliaments and Public Assemblies and Councils of Us Our heirs and successors within Our United Kingdom amongst other Barons And also that he and his heirs male aforesaid successively may enjoy and use all the rights privileges pre-eminences immunities and advantages to the degree of a Baron duly and of right belonging which other Barons of Our United Kingdom have heretofore used and enjoyed or as they do at present use and enjoy.

In Witness, &c.

APPENDIX F

MAGNA CARTA

1. The Church is to be free and to have her liberties inviolable.

2. The heir, if of full age, is to pay the customary relief only—*i.e.*, for baron or earl, £100: for knight, 100s.

3. The heir of Earl or Baron, if under age, to be in wardship. When he comes of age to have his inheritance without relief and fine.

4. Guardians (*i.e.*, lords of fees) are to take responsible and customary profits from the ward, and the inheritance is not to wasted, neither is there to be destruction of property.

5. Heirs are to be married without disparagement (*i.e.*, they must marry a man or woman of similar rank).

6. The Sovereign shall not authorise mesne lords to exact other than the three customary aids: (1) to ransom the lord's person; (2) to contribute to knighting his eldest son; (3) to portion once his eldest daughter. Aids must be reasonable.

7. The King shall not hold the lands of convicted felons for more than a year and a day, after which the said lands are to be handed over to the mesne lord.

8. Common Pleas shall not follow the King's Court but shall be held in some fixed place.

9. The Assizes of Novel Disseisin, Mort d'Ancestor, and Darrein Presentment shall only be held in the court of the county

where the lands are situate. The King, or in his absence the Justiciar, shall send into each county two justices four times each year, who, with four knights to be chosen by the county court, shall hold such assizes.........

10. A freeman shall only be amerced, for a small offence after the manner of the offence, for a great crime according to the heinousness of it, saving to him his contenement.

11. No sheriff, constable, coroner, or bailiff is to hold Pleas of the Crown.

12. The Writ of Inquest of life and limb shall be given gratis and not denied.

13. In future any one may leave the kingdom and return at will, unless in time of war, when he may be restrained for some short space for the common good of the kingdom. Prisoners, outlaws, and alien enemies are excepted from the benefit of this clause.

14. Justices, constables, sheriffs, and bailiffs shall only be chosen from those who know the law and mean duly to observe it.

15. No scutage or aid shall be imposed, except the three accustomed aids before-mentioned..............

16. In order to take the common counsel of the realm in the imposition of aids other than the accustomed aids, the King shall cause to be summoned the archbishops, bishops, earls, and greater barons by separate writs addressed to each, and all others by a general writ addressed to the sheriff of each county. A certain day and place is to be fixed for the meeting, of which forty days' notice shall be given, and the cause of summoning the assembly is to be specified and the consent of those present is to bind those not present.

17. "No freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers or the law of the land. To none will we sell, to none will we deny, or delay right or justice."

APPENDIX G

BILL OF RIGHTS

Bill of Rights is the term commonly applied to the English Statute 1 William and Mary, Session 2, chapter 2, of 1689, the most important of the parliamentary enactments by which legal effect was given to the revolution settlement. Its chief constitutional and political significance lies in the important limitations it imposed on the royal prerogative; it declared to be illegal the suspending of laws by the king, the dispensing with laws as exercised before the revolution, the levying of money without authorization of Parliament and the retention of a standing army in time of peace without Parliament's consent. The statute also asserted the subjects' right of petition and, in the case of Protestants, the additional privilege of bearing arms; it declared that elections to Parliament ought to be free, that freedom of debate therein "ought not to be impeached or questioned in any Court or

Place out of Parliament," "that excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted," "that jurors ought to be empaneled and returned "duely," that in cases of high treason juries should consist of freeholders only and that "Parlyaments ought to be held frequently." The bill further declared that since James had "abdicated", William and Mary "be and be declared" king and queen "of England, France and Ireland and the dominions there-unto belonging" and provided for the succession on their deaths, limiting it to Protestants and those married to Protestants.

The Bill of Rights, although in form and legal effect an ordinary act of Parliament, has always been ranked with Magna Carta and the Petition of Right as one of the few fundamental documents of the English constitution. Its provisions concerning the succession were supplemented in 1701 by the Statutes 12 and 13 William III, Chapter 2, known as the Act of Settlement, and the royal declaration against transubstantiation, prescribed in the bill, was abolished in recent times; but most of the other provisions of the act are still the law of the land.

APPENDIX H

THE PARLIAMENT ACT, 1911

By the Parliament Act of 1911 (1 and 2 Geo. V, c. 13) it is provided

1. That if a Money Bill (subsequently defined as 'a Public Bill' which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or the following subjects —a list follows) is sent up to the House of Lords at least one month before the end of the session and is not passed by the House of Lords without amendment within one month after it is sent up, the Bill shall, unless the House of Commons direct the contrary, be presented to the King and become an Act of Parliament on the Royal Assent being signified notwithstanding that the House of Lords have not consented to the Bill.

2. That if any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not) and having been sent up to the House of Lords at least one month before the end of the session is rejected by the House of Lords in each of those sessions, the Bill shall on its rejection a third time by the House of Lords, unless the House of Commons direct the contrary be presented to the King and become an Act of Parliament on the Royal Assent being signified thereto, provided that two years have elapsed between the date of the second reading in the first of these sessions in the House of Commons and the date at which it passes the House of Commons in the third of these sessions.

3. That a Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses.

4. That the House of Commons may in the passage of such a Bill through the House in the second and third sessions *suggest* amendments without inserting them in the Bill. If these amendments are agreed to by the House of Lords, they shall be treated as amendments made by the House of Lords and agreed to by the House of Commons.

5. That the duration of Parliament should be reduced from seven to five years.

APPENDIX I

EMERGENCY POWERS ACT, 1920

An Act to make exceptional provision for the Protection of the Community in cases of Emergency.

29th October, 1920.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1) If at any time it appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, His Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency), declare that a state of emergency exists.

No such proclamation shall be in force for more than one month, without prejudice to the issue of another proclamation at or before the end of that period.

(2) Where a proclamation of emergency has been made, the occasion thereof shall forthwith be communicated to Parliament, and, if Parliament is then separated by such adjournment or prorogation will not expire within five days, a proclamation shall be issued for the meeting of Parliament within five days, and Parliament shall accordingly meet and sit upon the day appointed by that proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day.

2.—(1) Where a proclamation of emergency has been made, and so long as the proclamation is in force, it shall be lawful for His Majesty in Council, by Order, to make regulations for securing the essentials of life to the community, and these regulations may confer or impose on a Secretary of State or other Government department,

or any other persons in His Majesty's service or acting on His Majesty's behalf, such powers and duties as His Majesty may deem necessary for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light, and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to His Majesty to be required for making the exercise of those powers effective :

Provided that nothing in this Act shall be construed to authorise the making of any regulations imposing any form of compulsory military service or industrial conscription :

Provided also that no such regulation shall make it an offence for any person or persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike.

(2) Any regulations so made shall be laid before Parliament as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both Houses providing for the continuance thereof.

(3) The regulations may provide for the trial, by courts of summary jurisdiction, of persons guilty of offences against the regulations; so, however, that the maximum penalty which may be inflicted for any offence against any such regulations shall be imprisonment with or without hard labour for a term of three months, or a fine of one hundred pounds, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed : Provided that no such regulations shall alter any existing procedure in criminal cases, or confer any right to punish by fine or imprisonment without trial.

(4) The regulations so made shall have effect as if enacted in this Act, but may be added to, altered, or revoked by resolution of both Houses of Parliament or by regulations made in like manner and subject to the like provisions as the original regulations; and regulations made under this section shall not be deemed to be statutory rules within the meaning of section one of the Rules Publication, Act, 1893.

(5) The expiry of revocation of any regulations so made shall not be deemed to have affected the previous operation thereof, or the validity of any action taken thereunder, or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty.

3.—(1) This Act may be cited as the Emergency Powers Act, 1920.

(2) This Act shall not apply to Ireland.

APPENDIX J

THE IRISH FREE STATE CONSTITUTION, 1922

SECTION 1.—FUNDAMENTAL RIGHTS.

ARTICLE 1.

The Irish Free State (Saorstat Eireann) is a co-equal member of the Community of Nations forming the British Commonwealth of Nations.

ARTICLE 2.

All powers of government and all authority legislative, executive, and judicial, are derived from the people and the same shall be exercised in the Irish Free State (Saorstat Eireann) through the organisations established by or under, and in accord with, this Constitution.

ARTICLE 3.

Every person domiciled in the Irish Free State (Saorstat Eireann) at the time of the coming into operation of this Constitution who was born in Ireland or either of whose parents was born in Ireland or who has been so domiciled in the area of the jurisdiction of the Irish Free State (Saorstat Eireann) for not less than seven years is a citizen of the Irish Free State (Saorstat Eireann) and shall within the limits of the Irish Free State (Saorstat Eireann) enjoy the privileges and be subject to the obligations of such citizenship, provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstat Eireann) shall be determined by law. Men and women have equal rights as citizens.

ARTICLE 4.

The National language of the Irish Free State (Saorstat Eireann) is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Parliament (Oireachtas) for districts or areas in which only one language is in use.

ARTICLE 5.

No title of honour in respect of any services rendered in or in relation to the Irish Free State (Saorstat Eireann) may be conferred on any citizen of the Irish Free State (Saorstat Eireann) except with the approval or upon the advice of the Executive Council of the State.

ARTICLE 6.

The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained, the High Court (Ard Chuirt) and any and every judge thereof shall forthwith enquire into the same and may make an order

requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or Judge without delay and to certify in writing as to the cause of the detention and such Court or Judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law.

ARTICLE 7.

The dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law.

ARTICLE 8.

Freedom of conscience and the free profession and practice of religion are inviolable rights of every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid betweeen schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.

ARTICLE 9.

The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no political, religious or class distinction.

ARTICLE 10.

All citizens of the Irish Free State (Saorstat Eireann) have the right to free elementary education.

ARTICLE 11.

The rights of the State in and to natural resources, the use of which is of national importance, shall not be alienated. Their exploitation by private individuals or associations shall be permitted only under State supervision and in accordance with conditions and regulations approved by legislation.

APPENDIX K

THE STATUTE OF WESTMINSTER, 1931

Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of

Australia, the Dominion of New Zealand, the Union of South Africa the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences :

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom :

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion :

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom :

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained :

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. In this Act the expression 'Dominion' means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in the Act that that Dominion has requested, and consented to, the enactment thereof.

5. (Powers of Dominion Parliaments in relation to merchant shipping. 57 & 58 Vict. c. 60.)

6. (Powers of Dominion Parliaments in relation to Courts of Admiralty. 53 & 54 Vict. c. 27.)

7.—(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9.—(1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

10.—(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may

provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression 'Colony' shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. This Act may be cited as the Statute of Westminster, 1931.

APPENDIX L

HIS MAJESTY'S DECLARATION OF ABDICATION ACT, 1936

WHEREAS His Majesty by His Royal Message of the tenth day of December in this present year has been pleased to declare that He is irrevocably determined to renounce the Throne for Himself and His descendants, and has for that purpose executed the Instrument of Abdication set out in the Schedule to this Act and has Signified His desire that effect thereto should be given immediately:

And whereas, following upon the communication to His Dominions of His Majesty's said declaration and desire, the Dominion of Canada pursuant to the provisions of section four of the Statute of Westminster, 1931, has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa have assented thereto:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Immediately upon the Royal Assent being signified to this Act the Instrument of Abdication executed by His present Majesty on the tenth day of December, nineteen hundred and thirty-six, set out in the Schedule to this Act, shall have effect, and thereupon His Majesty shall cease to be King and there shall be a demise of the Crown, and accordingly the member of the Royal Family then next in succession to the Throne shall succeed thereto and to all the rights, privileges, and dignities thereunto belonging.

(2) His Majesty, His issue, if any, and the descendants of that issue, shall not after His Majesty's abdication have any right, title or interest in or to the succession to the Throne, and section one of the Act of Settlement shall be construed accordingly.

(3) The Royal Marriages Act, 1772, shall not apply to His Majesty after His abdication nor to the issue, if any, of His Majesty or the descendants of that issue.

2. This Act may be cited as His Majesty's Declaration of Abdication Act, 1936.

SCHEDULE A.D. 1936.

I, Edward the Eighth, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Emperor of India, do hereby declare my irrevocable determination to renounce the Throne for myself and for my descendants, and my desire that effect should be given to this Instrument of Abdication immediately.

In token whereof I have hereunto set my hand this tenth day of December, nineteen hundred and thirty-six, in the presence of the witnesses whose signatures are subscribed.

EDWARD R. I.

Signed at Fort Belvedere
in the presence of
ALBERT,
HENRY,
GEORGE.

APPENDIX M

IRISH CONSTITUTION, 1937

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Eire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.

Do hereby adopt, enact, and give ourselves this Constitution.

THE NATION

ARTICLE 1.

The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.

ARTICLE 2.

The national territory consists of the whole of Ireland, its islands and the territorial seas.

ARTICLE 3.

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstat Eireann and the like extra-territorial effect.

THE STATE

ARTICLE 4.

The name of the State is Eire.

ARTICLE 5.

Eire is a sovereign, independent, democratic state.

ARTICLE 6.

1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.

ARTICLE 7.

The national flag is the tricolour of green, white and orange.

ARTICLE 8.

1. The Irish language as the national language is the first official language.

2. The English language is recognized as a second official language.

3. Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.

ARTICLE 9.

1. The acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.

2. Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.

FUNDAMENTAL RIGHTS

PERSONAL RIGHTS

ARTICLE 40.

1. All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

2.—(1) Titles of nobility shall not be conferred by the State. Orders of Merit may, however, be created.

(2) No title of nobility or of honour may be conferred on any citizen except with the prior approval of the Government.

3.—(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

(2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

4.—(1) No citizen shall be deprived of his personal liberty save in accordance with law.

(2) Upon complaint being made by or on behalf of any person that he is being unlawfully detained, the High Court and any and every judge thereof shall forthwith enquire into the same and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such court or judge without delay and to certify in writing as to the cause of the detention, and such Court or judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law.

(3) Nothing in this section, however, shall be invoked to prohibit, control, or interfere with any act of the Defence Forces during the existence of a state of war or armed rebellion.

5. The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

6.—(1) The State guarantees liberty for the exercise of the following rights, subject to public order and morality:—

(*i*) The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, shall not

be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

(*ii*) The right of the citizens to assemble peaceably and without arms.

Laws, however, may be enacted to prevent or control meetings which are calculated to cause a breach of the peace or to be a danger or nuisance to the general public.

Laws may be enacted for the regulation and control of open air meetings so as to ensure that they will not interfere unduly with public convenience and for the prohibition or regulation of meetings in the vicinity of the place of meeting of either House of the Oireachtas.

(*iii*) The right of the citizens to form associations and unions.

Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.

(2) Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.

GENERAL INDEX.

Note.—The figures in bold type indicate the important passages dealing with each subject.

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